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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE SHARPLES SEPARATOR COMPANY

(a corporation),

Plaintiff in Error,

VS.

W. W. SKINNER,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

J. J. DUNNE,

WILLARD P. SMITH,

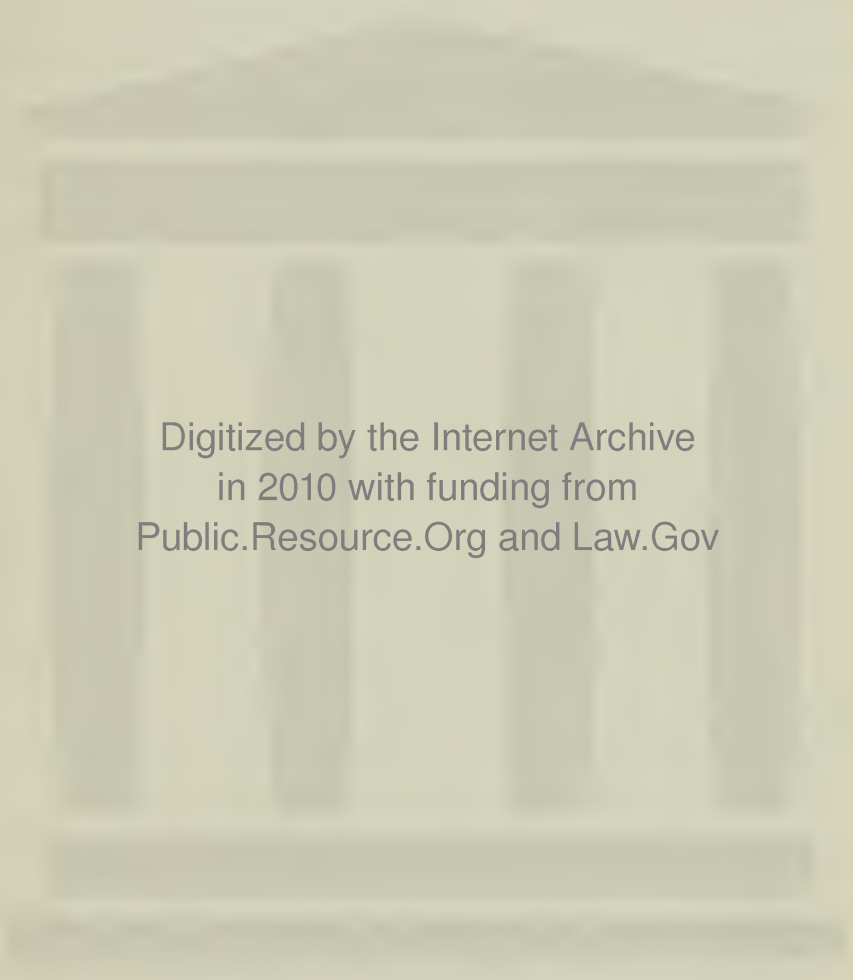
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BRIEF FOR PLAINTIFF IN ERROR.

General Statement of the Case.

This cause was originally instituted in the Superior Court of the State of California, but was subsequently removed to the United States District Court for the Southern District of California, Southern Division. It is an action at law designed to recover damages claimed to have been sustained by an alleged breach of an alleged warranty. The plaintiff obtained the verdict below, and in due course this writ of error issued.

It is our purpose to make a general statement of the leading features of the case as disclosed by the record. We do not conceive this course to be inappropriate: it will illustrate the theories of the contending parties:

it will assist the proper understanding of the rulings of the learned judge of the court below: it will exemplify the importance to the present plaintiff in error of correct instructions upon the legal issues involved: it will facilitate intelligent treatment of the charge of the learned judge below to the jury, especially in view of the right enjoyed by the defendant below, in common with every litigant, to have instructions given the jury to meet his theory of the case; and it will, we venture to believe, lighten the labors of this court by manifesting and clarifying the perspective of the case.

W. W. Skinner, the plaintiff below and defendant in error here, was a resident of El Centro, Imperial Valley, California; and when, on October 10, 1916, he testified in the court below (110), he had been such resident for at least five years (111),—ample time, one would suppose, within which to become acquainted there and to contract friendships among his fellow dairymen. What Mr. Skinner's prior activity may have been is not disclosed, but, during this period of his residence at El Centro, he had been engaged in the dual occupation of dairying and ranching (111). It is not established that, prior to his advent in El Centro, he had enjoyed that experience in dairying which might have qualified him to speak with authority upon dairy questions: nor, after his arrival at El Centro, does the record disclose the relations between his dairying and his ranching activities. We are nowhere advised as to how much space, care, time or attention he gave to dairying, or how much to ranching:

which of these activities predominated, is nowhere exhibited; and there is nothing in this record, as we read it, to justify any claim that he devoted more time to dairying than to ranching, or to show what amount of time he actually surrendered to dairying in particular. In a word, Mr. Skinner's experience and qualifications as a dairyman are quite indistinct and this record is perfectly consistent with the claim that he was primarily a rancher, that he left the dairying to his wife, son and hired youth ("I am familiar with "the string of dairy cows owned by my husband; "at that time, before we got the milker, I had "milked most every cow in the corral"—Mrs. Ida Skinner, 170: "After the milker was installed, it was "operated by myself and the other hired man"—Aubrey Skinner, 166: "I got to operating the machine—"that is, I would go in, watch the boys and help; I "would be in there—well, I have operated that, not "regular. * * * This young man Allen and my "son did most of the milking"—Skinner, 145), and that his personal experience with dairying was not of a character to invest with impressiveness his views upon dairy questions. In both his original (8) and amended complaints (59), he voluntarily describes himself as "farmer and dairyman", rather than as "dairyman and farmer".

Mr. Skinner was a married man. His family consisted of his wife, Mrs. Ida Skinner, and a young son, Aubrey, who, at the time of the occurrences adverted to in the record, was an inexperienced boy of about 21 years of age (166). The family lived

together at El Centro, and it is not unreasonable to infer that, during their five years of residence there, they had become acquainted with other residents of Imperial Valley, so many of whom appeared in rebuttal to help out the case of their neighbor. To assist in the dairying, Mr. Skinner hired a young man named Allen who was about the same age as Mr. Skinner's son—"22 or 23 years old", as Mr. Skinner tells us; and, as Mr. Skinner further tells us, "This young man Allen and my son did most of the milking" (145),—a circumstance not without significance in view of the claims subsequently made by Mr. Skinner, and in view of the uncontradicted statement of Dr. Hart, the veterinary surgeon, that "there are men of the type of milkers that are found around this country that even though they thought they were following the instructions as given in this book by the Sharples Separator Company, he wouldn't be following those instructions, and had no knowledge of mechanics, and that type of men are not considered sufficiently capable of handling a milking machine, even though they are capable of hand milking cows" (200). At the trial below, Mr. Skinner and his wife and son were the only witnesses presented in the case in chief. The sanitary condition of the Skinner dairy was put in issue by the answer (75-6), and was a highly material matter: yet, not only was no inquiry made from Mrs. Skinner, or from the son, as to that sanitary condition, they being much more familiar with it than any chance or casual visitor, but Allen was as a witness conspicuous by his absence, although not shown to have been inaccessible to the plaintiff below or accessible to the

defendant below, although no explanation to account for Allen's significant absence was attempted by the plaintiff, and although it was not shown that at the time of the trial Allen was no longer in the employ of the plaintiff—*non constat* but that Allen was then actually in the plaintiff's service. It is, of course, familiar learning that the conduct of a party to an action in omitting to produce evidence materially bearing upon the matter in dispute, which is within his power and rests peculiarly within his own knowledge, and which under the circumstances would be expected to be produced, frequently affords a presumption against him that such evidence, if produced, would operate to his prejudice. In such cases, the natural inference is that the evidence is held back because it would be unfavorable: that is to say, the failure to call an available witness possessing knowledge concerning facts essential to a party's case, or to examine such witness as to the facts covered by his special knowledge (as, for example, in the instances of Mr. Skinner's wife and son as to sanitary conditions), especially if the witness be naturally favorable to the party's contention, gives rise to the inference that the testimony of such unproduced or unexamined witness would not sustain the contention of the party. If, at the times and places of the occurrences referred to in the testimony, Allen was in the employ of the plaintiff, then he will be presumed to be still in the employ of the plaintiff, unless otherwise shown by the plaintiff; and if Mr. Allen were available to Mr. Skinner as a witness upon the trial,—and Mr. Skinner has not shown that he was not,—then the defendant below should not be

put to the risk of resting its defense upon the testimony of Skinner's employee, nor should the defendant below be compelled to surrender the right of cross-examination or the just legal inference arising from the failure to call Allen as a witness. In a word, it was the plain duty of the plaintiff to produce Allen as a witness, or to explain his absence; and since the plaintiff has failed to do either, such failure gives rise to the inevitable inference that the testimony of Allen would have been unfavorable to the contention of the plaintiff. (As supporting these views, see, *inter alia*: *R. v. Burdett*, 4 B. & Ald. 122: *Clifton v. U. S.*, 45 U. S. (4 How.) 242: *Runkle v. Burnham*, 153 id. 226; *Kirby v. Talmadge*, 160 id. 379: *The New York*, 175 id. 204; *The Fred. M. Lawrence*, 15 Fed. 635: *McFarland v. The J. C. Tuthill*, 37 id. 714: *The Jos. B. Thomas*, 81 id. 578: *Waterhouse v. Rock Island Co.*, 97 id. 477: *Am. Bell Tel. Co. v. Nat Tel. Mfg. Co.*, 109 id. 1018: *In re Kellogg*, 113 id. 120: *The Robert Lewers*, 114 id. 849: *Sauntry v. U. S.*, 117 id. 132: *The Georgetown*, 135 id. 859: *Choctaw Ry. v. Newton*, 140 id. 238: *The Degama*, 150 id. 324: *Norquet v. Paramount Mills*, 177 id. 975: *Metr. L. Co. v. Davis*, 205 id. 486: *Sherman v. S. P. Co.*, 111 Pac. (Nev.) 416, 422-3: *Vandervort v. Fouse*, 43 S. E. (W. Va.) 112: *Briedenbach v. McCormick Co.*, 20 Cal. App. 184, 189: *Standard Oil Co. v. State*, 100 S. W. (Tenn.) 705, 718: *Cummings v. Nat. Furnace Co.*, 18 N. W. (Wisc.) 742; 20 id. 665; *Boler v. Sorgenfrei*, 86 N. Y. S. 180; *Maus v. Broderick*, 25 So. (La.) 977: *Anderson v. Cumberland Co.*, 38 So. (Miss.) 785, 787-8).

So far as the sanitary conditions at this dairy are concerned, it does seem that those who had opportunities for observation might well have supplied us with something more than obscure generalities: but the information furnished us by Mr. Skinner, Mr. Skinner's family and Mr. Skinner's Imperial Valley witnesses is not, to say the least, creditable to that aspect of Mr. Skinner's premises. We are told that he had a herd of cows there: we observe that he is not backward in commendation of his own cattle: but we get no satisfactory information as to the size of the dairy, or as to the methods, appliances or conveniences employed in its operation, or as to the degree of its approximation to approved modern sanitary dairy methods or conditions. Not only are we left in the dark as to this, but the evidence quite fails to put Mr. Skinner in advance of the average of his fellow-dairymen in Imperial Valley, so far as this vital matter of sanitation is concerned: he shares their prejudices: he entertains the view that what was good enough for his neighbors was good enough for him, regardless of the views of others: except under stress, no convincing reason appealed to him to spend money—not even ten dollars, to install a clean floor in a milking barn (142)—to please theorists; and his general mental attitude as to sanitary conditions or improvements was not such as to stamp him an apostle or pioneer of cleanliness. When the sanitary advantages of a cement floor are put squarely to him, he fails to answer, and becomes coy—not to say evasive (141-2): but it nevertheless appears that Imperial Valley standards of sanitation were not of the highest, that it was not customary

for local dairymen there to cement their floors, and that most of them have just an ordinary dirt floor (141); and in accord with these views of his fellow-dairymen, Mr. Skinner made no attempt to install a cement floor until after he had got into touch with this plaintiff in error (140-143).

The same disregard of sanitation re-appears in the matter of stanchions: their function "is to secure a cleaner milk supply, to prevent the cattle from moving around in a manure-laden corral while milking is being done" (196): the prior attention of either Mr. Skinner or his fellow-dairymen in Imperial Valley does not appear to have been attracted to this advantage so obviously conducive to good sanitation; and, like the cement flooring, the presence of these stanchions was a product of Mr. Skinner's contact with the present plaintiff in error.

One would suppose that a dairyman, sensitive to his sanitary surroundings, would regard an adequate barn as a component part of an adequate dairy, but Mr. Skinner classified a barn among the elegant superfluities of an effete civilization: during his five years of residence in Imperial Valley prior to January, 1914, he had no barn at all: no more significant exposure of his lack of appreciation of his sanitary obligations could well be desired than that contained in his contemptuous remark, when asked whether his barn would not be more sanitary were a floor installed, that "I would not give a man \$10 to go and install one" (142); and the presence of liquid and manure deposited upon a dirt floor, with these very cows treading and stamp-

ing in the mud (142), would not, therefore, attune Mr. Skinner's delicate appreciation to finer or higher issues of sanitation.

The disclosures of this record as to the drinking places provided by Mr. Skinner for his cows, are not such as to excite any surprise at the information that those cows were afflicted with contagious, or infectious, mammitis. "All of the water in Imperial Valley comes "from a common source, the Colorado River" (153): this water is impregnated with silt (180), and must be settled in settling basins (152): a bacteriological analysis of this general water supply showed large numbers of organisms of the yellow micrococcus variety, the morphology of which, as well as their cultural and biochemical character, were identical with those found in the milk taken from Mr. Skinner's cows (180-181); and no attempt was made to attack these statements of a highly experienced specialist of unimpeached integrity. Prior to the fall and winter of 1913, there was not even a settling basin upon the Skinner premises (153): most of the Skinner cows drank out of the irrigation ditch: a great many of them would walk right into the ditch, and when they did the udders and teats would get into the water (154 *ad finem*); and in all this, Mr. Skinner followed the example of his fellow-dairymen, it being the fact that "most of the "people in the Imperial Valley permit their cows to "wade out in the irrigating ditch" (154). Nor was this all: there was a water or mud hole on the premises in which animals were occasionally seen: a pig was seen drinking there: sick calves were occasionally seen in it;

and, after the mechanical milker was installed, parts of it, namely, the teat cups, stood over night in a pail of the water from this water or mud hole (236, 237, 238); and these facts appear from a deposition taken for Mr. Skinner, but, with great discretion, not offered by him upon the trial (233).

Mr. Skinner did not, judging from his conduct, believe that any canon of sanitation called on him to take active measures to improve the water which his cows drank and in which his dairy utensils were washed. All of his water—infested by the yellow micrococcus—came from the Colorado River: as he says, “I take
“ my water from this same common source of water
“ supply” (155): “it was not well water of any kind,
“ it was not pump water” (235): “it was not clean
“ water” (238): “in 1914, practically everybody who
“ had dairy herds was using water from these canals” (262); and in the opinion of the Inspector for the State Dairy Bureau who was called by plaintiff, but who never was applied to by Mr. Skinner for a certificate to the cleanliness of his dairy, “I would not consider a
“ dairy which had a mud hole a sanitary dairy” (265).

Nor is this the whole story: because, not only did Mr. Skinner, whose insensibility to his sanitary responsibility was so great that to help to discharge it he would not spend even \$10 (142), permit his cows to wade into this tainted water (154, 181, 194), but the animals themselves were unclean: they were not groomed (179): their bodies and legs were muddy (id.)—a condition which reflects very unfavorably the state of the Skinner premises; and this very mud is,

if anything, an even more potent agency in spreading contagion than the water itself. As observed by Dr. Hart: "As the probability of a cow becoming infected
 " with infectious mammitis, if the water in which she
 " waded, or the mud around the farm contained water
 " infected with staphylococci, if the cow was in the
 " mud, the probability would be greater than in the
 " water. It seems that in corrals, the experience that
 " we have found around the City of Los Angeles, has
 " been that where cows are in muddy corrals, so that
 " they have to lie down under wet conditions, and
 " mud sticking around the teats, that there is considerable or some greater probability of infectious
 " mammitis than if they walked through streams of
 " water" (194-5).

And the premises were no better groomed than the cows: the same unprogressive spirit which permitted the cows to become mud-caked, permitted the premises to go for a month at a time without cleaning (158): the unfastened cows were free to move about or lie down in the manure-laden yard (157-8); and the fact that "we would not clean it (the yard) out very day;
 " sometimes not for a month" (158), caused Nye, a witness for the plaintiff, to declare that "if they
 " milk cows in the yard, and only clean the droppings
 " out once a month, that would not be a sanitary
 " dairy" (264),—a point of view in which Rodgers, another of plaintiff's witnesses, concurred (266). But is it really necessary to contend that, in a dairy of all places, sanitary conditions require, not only the absence of tainted mud, but also continued and unbroken cleanliness? Does not that situation speak for itself?

Could any reasonable person pronounce sanitary a dairy in which either the utensils or the hands of the milkers were unclean (238)? Would not this aspect of the situation at once attract the attention of a proprietor sensitive to his sanitary duties and progressive enough to care something more for cleanliness than a ten-dollar piece? But there can be no disguising the fact that it was the same old water that was upon the premises—Colorado River water (156-7), with its yellow micrococcus organisms “identical with those “obtained from the udders of the Skinner cattle” (181). Dr. Taylor realized the folly—not to use a harsher term—of using this water to wash milking utensils, and asked the plaintiff whether the water was boiled before being used; and it was Dr. Taylor’s recollection that the plaintiff said that the water was simply heated but not brought to the boiling point—a condition wholly incompetent to sterilize articles washed therein (180). This statement of Dr. Taylor is nowhere contradicted: indeed, it could not be contradicted by Mr. Skinner, because, as to all that relates to Dr. Taylor, Mr. Skinner relapsed into a typical *non mi ricordo* witness (152). Even if the water had been boiled and then cooled, so that the water itself, standing alone, would be sterile, yet as soon as the milking utensils were placed in it, that water would immediately become infected with bacteria, and no sterilization of the utensils would ensue (196-7). And that this water was an effective instrumentality for the propagation of contagion was a postulate in the cause (193-4; 238-9): even the teat-cups of the milking machine were washed in water that “was inhabited by sick calves and hogs”

(238); and, in addition to all this, where infectious or germ-laden dust, as is frequently the case, gets “blowing around the milk house”, such a condition is not conducive to the maintaining of sterile milking utensils (216). This lack of cleanliness, this disregard of the most obvious requirements of proper dairy sanitation, was no new thing: it is precisely the condition one would expect to find upon the premises of an unprogressive person who was content to follow the unprogressive methods of his unprogressive neighbors; and no surprise is excited when we find Reed, whose deposition was taken on behalf of the plaintiff, telling us that “before I went down there, cows were “ milked by hand; when I first came down, they were “ all milked by hand; the men did not wash their “ hands during the milking. They only washed their “ hands when they came out to milk the cows, and “ then from a private cistern at the house. The water “ in this cistern at the house came from the irrigation “ canal on the West Road” (238).

What, then, is to be thought of a dairy operated by a man unresponsive to the requirements of adequate sanitation and content to follow the indifferent methods of his neighbors, whose actual conditions were those of dirt, who had no barn, no stanchions, no cement or even wooden floor, whose water was tainted by bacteria, whose cows waded into and drank of this tainted water, whose cows were not groomed and were permitted to roam about and lie down in the mud of a urine-soaked yard and become mud-caked, whose yard was not systematically cleaned at short intervals but at

times allowed to go uncleaned for as long as a month, whose milking utensils were not properly sterilized and were washed in the tainted water, and the hands of whose milkers were allowed to become potent factors in the dissemination of disease? Can such concrete facts as these be met by general asseverations of cleanliness, however vociferous? Can it be fairly said of such a place as this that in it "all reasonable precautions tending to the production of clean milk" (114, at top) were observed? What hope for the future could arise from such unprogressive, backward and insanitary conditions as these? Is it any wonder that a man of Mr. Skinner's unprogressive type should assert that "the cows had not been exposed to any "contagious disease" (121), and should refuse to believe in the presence of contagious mammitis among these cows (237)? Is it any wonder that no veterinarian was produced who was able to say rationally and credibly that, from an examination of these animals, "the cows had not been exposed to any contagious "disease" (121)? Is it any wonder that this plaintiff in error offered to prove—but was prevented—that Imperial Valley dairy products were not permitted to enter the City of Los Angeles (200, 264)? Is it any wonder that even Mr. Skinner himself was constrained to testify thus (142-3):

"Q. In fact, that is the cost of fixing up your "barn, including the cement floor and the stanchions, "and cleaning up the surroundings *to make them sanitary?*

"A. Yes, sir."

Upon this vital matter of sanitary conditions, Mr. Skinner does not commend himself as a sincere or straightforward witness: he is too evasive. When questioned directly as to the advantages of a cement floor, he fails to answer (141-2): when asked whether he increased or decreased the pressure upon the cows, instead of answering directly as to what he did, he proceeds to relate what certain unidentified persons said, and then launches into unspecific and irrelevant generalities (148-9); and without adducing further examples, when dealing with the garget with which his cows were afflicted before he ever saw the mechanical milker that he subsequently purchased, he furnishes a typical illustration of evasion and lack of straightforwardness (150-1); and his testimony as given on page 152 of the Record is replete with evasive improbabilities.

Indeed, Mr. Skinner's whole mental attitude towards sanitation was unsympathetic: no one could well have been more unprogressive: he had no proper barn: he had no proper floor at his milking station: he had no stanchions: he had no engine to operate his separator: he took no pains with his animals: he took no pains with his milking utensils: the condition of the water mattered nothing: the condition of the premises was equally inconsequential: he clung to the primitive and out-of-date ideas and methods current among his fellow-dairymen of Imperial Valley; and he fell into that class of which Dr. Hart spoke when he said that "there are men of the type of milkers that are found "around this country that even though they thought

“ they were following the instructions as given in this
 “ book by the Sharples Separator Company, he wouldn’t
 “ be following those instructions, and had no knowl-
 “ edge of mechanics, and that type of men are not
 “ considered sufficiently capable of handling a milking
 “ machine, even though they are capable of hand
 “ milking cows” (200). Taking together all of the
 concrete information accessible, it is not too much
 to say that the actual conditions upon Skinner’s dairy
 were those of a dirty and insanitary dairy: Skinner
 himself concedes that when Reed came in October,
 1914, dirt had found its way into the milker (129);
 and Reed, whose deposition Skinner took, when speak-
 ing of the dairy shed and its gutters, tells us that
 “ I remember making a statement that the gutters
 “ were not fixed right, did not run off right, and that
 “ *it was an awful dirty place; and it was a dirty place*”
 (238).

Mr. Skinner tells us that “about the first of the
 “ year 1914, I had negotiations looking towards the
 “ purchase of a mechanical milker, at my home, three
 “ miles east and north of El Centro; these negotia-
 “ tions were opened by one Mr. Hickson on behalf of
 “ The Sharples Separator Company people” (111);
 and it is not difficult to distinguish, in Mr. Skinner’s
 account of the matter, between the preliminary negotia-
 tions and the actual transaction itself. Thus, on page
 111, he speaks of “*negotiations looking towards the*
 “ *purchase*”, and of the circumstance that these
 “ negotiations” were “opened”. And not only were
 these negotiations “opened”, but, as might well be

expected, they continued in progress until the ultimate transaction towards which the parties were progressing was finally accomplished: there is no pretense in this record that this purchase was an instantaneous act stripped of all prior negotiation; and when we find Mr. Skinner using the phrase "*during the negotiations*" (112), we readily perceive that he himself discriminated between the antecedent negotiations and the actual transaction,—a view which finds confirmation in the statement that "*this little pamphlet, or one like it, was left with me* PENDING NEGOTIATIONS" (116). It appears from Mr. Skinner's statement that "*during the negotiations*" which preceded the execution of the written contract relied on, "*certain printed literature published by The Sharples Separator Company*" was delivered to Mr. Skinner by a person whom Mr. Skinner describes as "*their sales agent*",—though just what authority Mr. Skinner had for this description is nowhere disclosed; and of this printed matter, certain fragmentary parts, *selected by plaintiff's counsel* as, in *his* opinion, "*pertinent to this case*", were allowed by the learned judge below to be read in evidence to the jury (111-2, 114-8), over the objections and exceptions of this plaintiff in error; this was done without any appeal to the plaintiff himself, and without any proof that the fragmentary passages so read by counsel of his own head, were passages which the plaintiff read or believed, or relied or acted upon; no proof was made that the passages read had influenced the plaintiff in any way: plaintiff's counsel was, indeed, rather, naive in the matter, plainly telling the jury that "I will

“ read you that portion of the printed literature of
 “ the Sharples Separator Company *which I deem per-*
“ tinent” (116)—not what Mr. Skinner deemed pertinent in January, 1914, but what counsel deemed pertinent on October 10, 1916; and obviously, if counsel did not consider these passages from this printed matter, to exert upon the jury an influence favorable to his contention, he would not have read them into evidence. Not only, however, did this action of the learned judge violate the parol evidence rule (California Civil Code, Sec. 1625), but the Record fails to show that the selected passages read to the jury were selected from the “printed matter” referred to in the contract of January 2, 1914, plaintiff’s Exhibit 1. Mr. Skinner not only does not identify the selected passages as being part of the “printed matter” referred to in the contract, but he does not identify the selected passages themselves: he makes no pretense of identification: he concedes his inability to recognize: he indulges in a mere conclusion when he speaks of “or one substantially like it”; and he not only fails to trace the material to a proved agent of the company, but he wholly fails to show that it was within the scope of Mr. Hickson’s authority—if he had any authority at all,—to bind the company by the distribution of any literature—for it is not yet the law that a company may be bound by any act or declaration of an unauthorized person (112). And this same lack of identification of the alleged printed matter itself, reappears on page 116: there, in two places, Mr. Skinner is plainly uncertain as to the identity of the pamphlet exhibited to him: he speaks in the disjunctive:

he refers to this "*pamphlet, or one like it*", but makes no attempt to explain the character or degree of similarity involved in the conclusion "*one like it*"—how "*like*", we are not told. Nor does he anywhere identify any particular part of this printed matter as a part which he read or on which he acted; and it is impossible to tell from his testimony what statement, if any, in this printed matter he believed or acted upon. But, nevertheless, these selected passages were allowed to go to the jury and were never expunged from the record: that they were not without influence upon the jury, the verdict demonstrates,—no man, indeed, can say that the jury was not influenced by these unidentified passages.

Mr. Skinner purchased three milking units from the Sharples Separator Company, and paid therefor the sum of "about \$460" (146). This purchase was made on January 2, 1914 (59); and it was made under and pursuant to the contract set forth on pages 112-114 of the record. The contract specifically provides that it "is subject to the conditions of sale and guarantee printed on the reverse side of this sheet": those conditions go to the mode of operation and care of the machine; and that guarantee goes to defects of workmanship or material, and "further guarantees this machine to be in all respects as represented in its printed matter"—though no identification of this "printed matter" is made, and further guarantees that the machine is "capable of doing the work as claimed" in this unidentified "printed matter". When the three units were installed in February, 1914, young

Allen was the hired man of the dairy, as already related; and “this young man Allen and my son did “most of the milking” (145), both being inexperienced boys. The plaintiff himself tells us that the machine operated by “alternate pressure and vacuum” and that “the amount of pressure and the amount of vacuum” could be regulated, and in that connection makes the following astonishing statement: “The instructions “say that to move this thing right here (indicating “on the machine) would regulate the amount of “pressure and the amount of vacuum; *I do not know “whether it does or not.* I do not know that I ever “tried it by putting my finger in the teat cup to “see the amount of pressure that was caused on my “finger where the cow’s teat would be, and on the “pulsator. As to the pressure at which I milk my “cows, I used 17 and 7; the vacuum 17 and the “pressure at 7; *I did that all the time on every cow;* “I made no change in the amount of vacuum and “the amount of pressure when I was milking a large- “teated cow; *I made the gauges stand at 17 and 7 all “the time”* (146-7). And in this connection, and as illustrating the plaintiff’s unintelligent mode of user of the machine, as well as his evasiveness, his statements, as contained in pages 147-9 should, we think, be carefully and analytically read, and read in connection with the son’s statement on page 169. And not only did the plaintiff fail to follow instructions in this regard, not only did he fail to distinguish between the pressure in the air-line and the pressure that was needed in the teat-cups (226-7), but he admits that he did not boil the teat-cups—the portion of the unit that

comes into contact with the cow. He claims to have cleaned them, but not in boiling water (149); but since nothing short of boiling water would sterilize the teat-cups (197), and since we know the disclosures of the bacteriological examination of the water itself (181), we are able to appraise at its proper value any claim by the plaintiff that he sterilized those teat-cups.

And moreover, he further states, "I never washed
 "or cleaned the teat-cups between one cow and
 "another at any time: after I milked the cow I
 "did not clean the teat-cups before I put them on
 "another cow" (149-50). If there is a fact settled in this case, it is that contagious mammitis is readily conveyed from one cow to another; and, while infections mammitis cannot be generated by a milking machine where proper care has been exercised to wash and sterilize the teat-cups (184-191, 213, 225, 229), yet the bacteria may come from the hand of a milker, or from the inadequately sterilized teat-cup of a machine, or from water in which the cows were permitted to wade, or from the corral in which they are allowed to lie down (185, 191-2); and consequently no more effective agency for the communication of this disease could well be imagined than that disclosed by the conditions surrounding Skinner's dairy and by his admissions as to his mode of user of the teat-cups. Dr. Taylor tells us (183-4), and it is plain common sense, that affected cows should be isolated; but was that course pursued upon the Skinner dairy? Apparently not: because the plaintiff's son tells us, on page 167, that "Between June 25th and July 7th, we had 14 cows

“in the hospital as we called it, and then there were
 “more that were not so bad and were left in the
 “corral *with the rest of them*”; and so with Mrs.
 Skinner, who says, “I observed the effect of the milker
 “to be the same—hard and swollen quarters; the cows
 “were ruined; there was, I think, 17, if I remember,
 “out of the corral, *and then more that were injured*
 “*in the corral*” (171). Taking all these facts together,
 they show plainly that the plaintiff did not comply with
 the conditions of sale of these three units, and that he
 did not observe “all reasonable precautions tending to
 “the production of clean milk” (113-4).

It is to be observed that throughout all this history,
 no man has been able to put his finger upon any
 mechanical defect in these three units. The plaintiff
 was specifically asked to state “what was mechanically
 “wrong”, and he replied that “I don’t know if there
 “was anything wrong with the pump” (158 *ad finem*);
 and he also declared that “aside from the injury
 “which I claim resulted to my cows, I would not
 “have any complaint about the milker” (158); and
 obviously, if, upon the facts here, the claimed injury
 can fairly be attributed to some cause other than the
 machine—such as contagious mammitis arising from
 insanitary conditions and transmitted by reason of
 the plaintiff’s insanitary methods—then surely it would
 be most unjust to permit this judgment to stand. Even
 the plaintiff’s partisan witness Boarts, the value of
 whose views may be gauged by his conception of
 sterilization as the rinsing of the teat-cups with cold
 water followed by a brushing with warm water (263),

and who rather grudgingly declared "I would not say "that I was infallible" (260), and who, of course, like the rest of Mr. Skinner's fellow-dairymen from Imperial Valley, was inimical to the milker machine,—even Boarts was constrained to concede on cross-examination that if the machine had drawn the milk (compare Skinner, 158, just above middle), and performed its mechanical functions all right, it would not have done any injury (261). And so with McCullough, another of plaintiff's witnesses, who made this statement: "My machine worked all right from a mechanical "standpoint; it was mechanically perfect; other than "the injury which I claim it did to the cows, it was "entirely satisfactory; with the possible exception "of the resultant injuries which I alleged happened "to my cows, it did all that I expected of the machine. "The operation of any mechanical milking machine "cannot cause infectious mammitis."

And what goes a very long way to sustain the mechanical sufficiency of this milker is to be found in the fact that no claim is anywhere made by Skinner that he ever notified defendant of any defect in the milker due to workmanship or materials.

Mr. Skinner purchased these three units in January, 1914, and they were installed in February, 1914. Thereafter, he purchased from the Edgar Bros. Company a fourth unit, which was delivered about May 6, 1914 (61). The purchase of this fourth unit was made "after "we had been running the machine some length of time" (118 *ad finem*),—in other words, after having had an experience of two months or more with the original

three units. With the purchase of this fourth unit, the present plaintiff in error had nothing to do: it gave no warranty of any sort as to this unit; and it nowhere appears that in the sale of this fourth unit, Edgar Bros. Company acted as the agent of this plaintiff in error (232-3, 48). And this view of the matter is supported by the declarations of the plaintiff himself, who states, "I did not communicate with any officer or employee of the Sharples Separator Company when I bought the fourth unit, I communicated with no one except Edgar Bros.; I never received any bill from Sharples Separator Company for the fourth unit." And it may be added that upon motion a nonsuit was granted as to the Edgar Bros. Company (174), and the action dismissed as to it (296).

Upon receipt by plaintiff of this fourth unit, he used it indiscriminately with the original three units; and so conscious of this was the plaintiff that, in his own mind, "the injury suffered by the plaintiff as the result of the acts of defendant, Edgar Bros. Company, a corporation, cannot be ascertained or estimated separately and apart from the injury suffered by plaintiff as the result of the acts of defendant, The Sharples Separator Company, a corporation" (29-30). In his amended complaint, the plaintiff asserts that "it was agreed by defendants" that this fourth unit should be affixed to the milker already purchased, "and should be operated jointly with the other three units" (61): but, while no proof was made of the agreement here referred to, and while the plaintiff of his own head did use the fourth unit indiscriminately

with the original three units, this allegation is but an additional item exhibiting plaintiff's own consciousness of this indiscriminate user. And so, on page 136, we find Mr. Skinner saying: "I first began to use the machine about the 7th of February, I think; and I think I received the fourth unit from Edgar Bros. in May; and I took the fourth unit from Edgar Bros. and connected it up and used it after that—after May. I had had other trouble before I got the fourth unit. As to what cows I used the fourth unit on, I used the fourth unit the same as the others. The four units, as nearly as a man could look at them and say, were identically alike; if a man was to hand that unit up and another unit up, he could not go and pick out which were those units. I kept no record of the cows upon which the particular units were used. I did not make or keep any record of the amount of milk obtained from each individual cow" (136). And again, on page 165, he says: "When Mr. Reed went down in October, he only used two units at a time on the 30 that were set aside, and the other two units were not used; Mr. Reed may have used all four of them; I don't know which ones he did use;" and as to this, Reed tells us, "At the time when I was there in October I used two units; I should say that one of those units was from Edgar Bros., and one came from Sharples" (238). And finally, upon this point, the following quotation from the record is not malapropos: "Whereupon, Mr. Parke read to the jury the following paragraphs from plaintiff's bill of particulars:

“ ‘7. All four units were in use before any of
 “ ‘plaintiff’s cows were seriously injured. The four
 “ ‘units were used indiscriminately, so that it is impos-
 “ ‘sible for plaintiff to itemize the injury caused by
 “ ‘the original three units as distinguished from that
 “ ‘caused by the fourth unit purchased by plaintiff
 “ ‘after the installation of the machine. No record
 “ ‘was kept of the amount of milk each cow gave.

“ ‘19. No information can be given as called for by
 “ ‘Demand No. 19, owing to the fact that no record
 “ ‘was kept of the effect of the use of the three units
 “ ‘purchased from defendant as contradistinguished
 “ ‘from the effect of the fourth unit subsequently pur-
 “ ‘chased but will say that approximately twenty of
 “ ‘plaintiff’s cows were ruined from the use of the four
 “ ‘units between the 25th day of June, 1914, and the
 “ ‘7th day of July, 1914. The last half of Demand
 “ ‘No. 19 appears to be repetition of Demand No. 17
 “ ‘and the answer thereto has hereinbefore been given’ ”
 (291-2).

It was after the plaintiff’s purchase and user of this fourth unit that the trouble began, and the significance of this important historical fact should not, we submit, be overlooked. It affirmatively appears from plaintiff’s amended complaint that he purchased the fourth unit “before plaintiff had discovered that said mechanical milker was injuring his said cows” (61). In telling his story to the jury, Mr Skinner stated, “I had been running the machine: the fourth unit came: trouble *began* to develop” (119); and later on, he remarks, “I had ordered this fourth unit, and it came:

“ I ordered it before I had any serious trouble” (147). And in his Bill of Particulars the plaintiff repeats that “ all four units were in use before any of plaintiff’s “ cows were seriously injured” (291). Mr. Skinner tells us that “The three units arrived on February 1, 1914” (118): the fourth unit was delivered about May 6, 1914 (61): but no serious complaint anywhere appears of any real trouble between February 1 and May 6, 1914 (118-9); and, in point of fact, the plaintiff himself admitted that “up to June 25th, none of the “ cows had sustained any permanent injury” (120, *ad finem*). And it certainly cannot be contended that the absence of trouble prior to the advent of the fourth unit establishes that the original three units were to blame for any trouble subsequently arising: on the contrary, it would establish that, up to the advent of the fourth unit, the cows had escaped contagion, thus relieving the original three units from responsibility for a condition which arose only after a strange factor had entered the situation.

The plaintiff tells us that “the Sharples people sent Mr. Reed to install the machine: he did so” (118): but just how Mr Skinner knew that the Sharples people sent Mr Reed upon this mission, is one of the mysteries of the case. On pages 120-1, we find Mr. Skinner talking to Edgar Bros, about the milker, and “a few days later Mr. Reed appeared upon the scene”: was this appearance attributable to Edgar Bros. or to “the Sharples people”? At all events, after the machine was installed and instructions given as to its user, Reed left: on this occasion, Reed was upon Mr. Skinner’s

place for "about two weeks" (166: 170); and during that time, the scope of his activity was limited to the installation of the machine and the giving of instructions as to its use—he was merely an installer and mechanical demonstrator, and nothing more. After Reed left in February, 1914, he did not return until June (120 *ad finem*): "up to June 25th, none of the " cows had sustained any permanent injury" (120 *ad finem*): at that time, Reed "ran the machine practically two weeks" (121); and he left on the 7th " of July" (122); and here, again, Reed's functions were purely mechanical—"he did all the using: he did " everything to it (the milking machine): I never " touched it" (128). And again, in October, we find Reed operating the machine (129), and he so continued until December. But by what authority Reed assumed to act, even in this mechanical capacity, we are not informed, except by Mr. Frank, the plaintiff himself being constrained to admit that "I do not know who " selected Reed to operate that machine" (131-2). When Reed arrived on October 20th, the plaintiff "had " no arrangements at all about paying Mr. Reed for " the time he should be there: I did not trade with " Mr. Reed: *I did not consider Mr. Reed in it at all*" (136). Reed's own explanation of his presence upon the Skinner premises is contained in the deposition taken by the plaintiff; and his story, as contained between pages 242 and 247 of the record, establishes that his functions there were purely mechanical: he was there "to install a mechanical milker": it was " Skinner's trouble with his cows" that brought him: he was "the expert in charge": "Skinner stopped his

“ machine and I was sent for to restart it”: “I re-
 “ started the machine”; and from October 20th to
 December 20th, he was there “to take charge of the
 “ mechanical milker”: “I operated the milker”. And
 Reed claims that between October 20th and December
 20, 1914, he “was working at that time for the Sharples
 “ Separator Company” (246-7),—a declaration in which
 he is flatly contradicted by the sales-manager of the
 company. In this connection, Mr. Frank states: “I
 “ know Albert J. Reed. He was with the Sharples
 “ Separator Company as a milking machine expert for
 “ a period of about nine months, and his employment
 “ ended with us prior to October, 1914. I think he had
 “ not been working for us for two or three weeks prior
 “ to October 20, 1914; his account had been squared
 “ up and been checked out. Mr. Reed was engaged to
 “ install milking machines and to instruct the pur-
 “ chasers of the same in their proper use. He worked
 “ under the direction of the San Francisco office. He
 “ might have been working for us some time in October,
 “ but was not working for us on October 20, 1914, or
 “ thereafter; I could not say how long before October
 “ 20. My best judgment is that he was not working
 “ for us for two or three weeks before the 20th of
 “ October, 1914. I do not know whether or not Reed
 “ went to the ranch of W. W. Skinner during the month
 “ of October, 1914. Mr. Reed left the San Francisco
 “ office, and it is my belief that he left for the W. W.
 “ Skinner ranch. He came in to call upon me before
 “ he went to the ranch of W. W. Skinner. I advised
 “ Mr. Reed that if he would call upon Mr. W. W.
 “ Skinner he could undoubtedly secure employment with

“ him as a milking machine operator; at that time Mr.
 “ Reed was not in the employ of the Sharples Separator
 “ Company. At the time when Mr. Reed was at the
 “ ranch of W. W. Skinner in October, November and
 “ December, 1914, I do not know in whose employ he
 “ was; he was not in the employ of the Sharples Sep-
 “ arator Company. I didn’t send Reed to the ranch
 “ of W. W. Skinner, as an employee of the Sharples
 “ Separator Company. On October 20, 1914, when
 “ Reed went to the place of W. W. Skinner at El
 “ Centro, Reed was no longer in the employ of the
 “ Sharples Separator Company, and I gave him no
 “ instructions as to what his future work would be,
 “ but suggested to him that if he was looking for em-
 “ ployment he could possibly obtain it from W. W.
 “ Skinner. I did not give him any instructions to go
 “ back to the Skinner place and restart the milking
 “ machine and endeavor to get it running right, be-
 “ cause he was not in the employ of the Sharples Sep-
 “ arator Company” (353-4). The more the situation
 of Mr. Reed is studied, the clearer becomes the propo-
 sition that his duties were purely mechanical, and that
 he was not invested by the plaintiff in error with any
 authority whatever to bind it by any ex parte contract,
 representation or declaration of his own.

Reed quit on December 20, 1914. Inquiry was then
 made as to the declarations of Reed “at the time he
 “ quit”; and over the objections and exceptions of this
 plaintiff in error, the learned judge of the court below
 permitted the inquiry, and the following occurred:

“Mr. SWING. Q. At the time Albert J. Reed quit, if he did, on December 20, state what, if anything, he said at the time he quit.

“A. When Mr. Reed quit?

“Q. Yes.

“Mr. PARKE. We object to that as incompetent, irrelevant and immaterial; and there is no evidence before this court of any kind, nature or description that Reed was agent of the Sharples Separator Company.”

“Said objection was then and there overruled by said court, to which ruling said defendant Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

“Exception Number 14-A.

“The WITNESS. A. The first intimation that I had that Mr. Reed was going to quit, I walked into the corral and there was one of the cows showed that she was not feeling good, and I was in a hurry and was going to the ranch, and I said, ‘Mr. Reed, is that cow sick?’ He said, ‘Look at her bag.’ And I just stopped, and it was a heifer and the bag was all swollen up, and I didn’t say a word, and Mr. Reed didn’t for half a minute, and then Mr. Reed said, ‘Skinner, I am going to quit; I have ruined the last cow with this machine that I expect to ruin’. He quit, and I took him to town, and after he got to town, the first thing he did, he went in and talked to Mr. Edgar. He made in my presence a statement to Mr. Edgar regarding his ability or inability to run the machine.

“The WITNESS (continuing). Reed quit. After he
 “ went in town, he sent Mr. Frank a telegram. I saw
 “ the telegram written; it was written by Mr. Reed.

“Q. Do you know his handwriting; are you able to
 “ identify that (handing paper to the witness)?

“A. It is very much like it. I believe it is.

“Mr. SWING. We offer now in evidence the copy
 “ written by Reed, which is attached to this deposition
 “ in which Reed testified in his handwriting, and which
 “ he wrote and also the original furnished by the com-
 “ pany, which is word for word like this. I offer the
 “ two.

“Mr. PARKE. We object to that as incompetent,
 “ irrelevant and immaterial; and further that no evi-
 “ dence is before the court that Reed was agent for the
 “ Sharples Separator Company, or any other employee
 “ at this time.

“Said objection was then and there overruled, by
 “ said court, to which said ruling said defendant
 “ Sharples Separator Company, a corporation, then and
 “ there duly excepted and now assigns the same as
 “ error.

“Exception Number 15.

“Mr. SWING. I will read this to the jury:

“ ‘Dated El Centro, California, December 18, 1914.
 “ ‘(Reading.) Sharples Separator Co., 420 Mission
 “ ‘Street, San Francisco. Have done everything pos-
 “ ‘sible. Serious trouble started again. Taking too big
 “ ‘risk to continue use of machine. We have dis-
 “ ‘cussed every possible phase of situation, but quit
 “ ‘milking, safest way, or we will have too big a loss,

“ ‘according to our agreement. Will await instructions
 “ ‘here. Wire at once. Albert J. Reed’.

“ ‘Said telegram was then and there marked by the
 “ ‘clerk as Plaintiff’s Exhibit 5’ ” (132-4).

Here and there, throughout the testimony of the plaintiff, references are made to Briggs, and in more than one place the names of Briggs and Reed are coupled together: but nowhere in this record is there a scrap of evidence to establish that the position of Reed was in any respect superior to that of Briggs, or that any authority was conferred by the company upon Reed which would give to his activity any wider scope than that of Briggs. The only evidence which we have as to the functions of Mr. Briggs is to be found in the explanation given by Mr. Frank. We are told by Mr. Frank that Briggs was employed by the company during 1914: “His position was milking machine expert. “His duties were to look after the milking machines, “their installation and troubles which customers occasionally have, and see that that particular line of “work was carried on properly, and to instruct the “dealers and agents in the proper use of the machine. He received instructions from me and worked “under my supervision” (252); and when the Skinner matter came up, Mr. Frank, instead of authorizing Mr. Briggs to bind the company by contracts, representations or declarations, “simply wrote or told Briggs “personally to follow out his usual custom or usual “practice in attempting to satisfy customers or to “correct any faulty installation, and find out what was “wrong and straighten out the trouble” (253). Mr.

Briggs visited the Skinner premises, and was instrumental in bringing Dr. Taylor there (177:189); as to this visit, Mr. Skinner's memory passed into occultation (152 *ad finem*). But the visits of Mr. Briggs developed action by the learned judge of the court below which was most prejudicial to this plaintiff in error; and in that behalf, the following occurred:

“After Reed left on the 7th of July, the milker was
 “not run any more, and lay idle until the latter part
 “of October. When Mr. Briggs appeared on the
 “scene one day and told me he had come down to
 “straighten up the milking machine business with me.
 “I had never seen him before.

“The COURT. State what Briggs did.

“The WITNESS. I can't well state what he did
 “without I tell you what passed between us. Briggs,
 “he wanted to start the machine again and I would
 “not agree with it.

“Mr. PARKE. We move to strike that out as to what
 “Briggs wanted to do.

“Said motion to strike out was then and there
 “denied by said court, to which ruling said defend-
 “ant, said Sharples Separator Company, a corpora-
 “tion, then and there duly excepted, and now assigns
 “said ruling as error.”

“Exception Number 5.

“The COURT. Just what did you do?

“The WITNESS. I finally agreed that if they would
 “take charge of the machine on 30 cows——

“Mr. PARKE. If the court please, we object to any
 “agreements entered into by and between Skinner

“ and Mr. Briggs, or anything in the nature of a war-
 “ ranty; this machine was sold on a written warranty;
 “ Briggs had no authority to contract.

“ Said objection was then and there overruled by
 “ said court, to which ruling said defendant, said
 “ Sharples Separator Company, a corporation, then and
 “ there duly excepted, and now assigns said ruling as
 “ error.

“ Exception Number 6.

“ The WITNESS. Briggs wanted to start the machine.
 “ I told him I would not let him do it. That was first.
 “ He then came back again. He and I went to Mr.
 “ Edgar Bros. and we came to an agreement. That
 “ agreement was later put into writing; this is the
 “ writing I entered into; my signature is at the bottom
 “ there; that is my signature; this H. S. King is Mr.
 “ Edgar Bros. man—I desired a witness. But for
 “ my receiving this written paper, I would not have
 “ allowed Reed to restart the machine.

“ Thereupon plaintiff offered in evidence a purported
 “ agreement, to the introduction of which in evidence
 “ said defendant Sharples Separator Company, a cor-
 “ poration, objected as irrelevant and incompetent, and
 “ incompetent as it involves representations other than
 “ those appearing on the written guaranty. A ruling
 “ upon the admissibility of said purported agreement
 “ and the objections of said defendant Sharples Sep-
 “ arator Company, a corporation, to the admission in
 “ evidence of said document was by said court deferred
 “ pending argument of counsel” (122-4). This pur-
 “ ported agreement was as follows:

“October 20, 1914.

“The Sharples Separator Company do hereby agree
 “ to furnish W. W. Skinner one Mechanical Milker Oper-
 “ ator for two months more or less, Mr. Skinner to pay
 “ him a salary of \$75.00 per month.

“It is further understood that Sharples Separator
 “ Company are to pay Mr. Skinner for any damage
 “ done to his cows by the use of the machine while
 “ in the hands of their operator.

“It is also understood the Sharples Separator Com-
 “ pany are to pay Mr. Skinner the amount of the
 “ operator’s salary providing the machines are not a
 “ success.

“SHARPLES SEPARATOR COMPANY,

“By F. L. Briggs.

“W. W. SKINNER.

“H. C. KING, Witness” (293).

Later, during the trial, the following occurred: “At
 “ this point, the jury retired from the courtroom and
 “ the court heard argument by counsel as to the com-
 “ petency of the purported agreement alleged to have
 “ been entered into in October, 1914, between the plain-
 “ tiff personally and said defendant Sharples Separator
 “ Company, a corporation, by one F. L. Briggs; and
 “ said court then and there ruled that such purported
 “ agreement was not competent evidence in this case
 “ and sustained the objection made thereto by the de-
 “ fendant Sharples Separator Company, a corporation”
 (127). Notwithstanding this ruling, however, the
 learned judge repeatedly permitted references to this
 purported agreement, favorable to the plaintiff,

examples of which may be found on pages 128-9, 131, 172.

So far as Reed and Briggs are concerned, it may conservatively be said that this record discloses that neither Mr. Skinner, nor his wife, nor his son, establishes either the agency, or the scope of the agency, of either Reed or Briggs, so far as concerns this plaintiff in error. While Reed makes the claim that he was working for the plaintiff in error as a mechanical expert, especially between October 20th and December 20, 1914, and while this claim is strenuously repudiated by the sales-manager of the company, yet even Reed himself makes no claim that he possessed any authority whatever to bind the plaintiff in error by any contract, representation or declaration. The same is true of Briggs. There is no proof that either Reed or Briggs was in any way authorized to bind the Sharples Separator Company by any contract, representation or declaration: Reed was a mere mechanical installer or demonstrator, and Briggs was the same: the learned judge of the lower court refused to recognize any authority in Briggs to bind the Sharples Separator Company by his contracts or declarations; and it is impossible to perceive that the position of Reed was any more exalted or called for any different treatment.

It cannot be successfully denied that, prior to the advent of the Sharples Mechanical Milker, Mr. Skinner's animals had already suffered from garget; and his admissions of this to Reed, as grudgingly disclosed on pages 150-1 of the record, conclude the matter. In describing garget upon page 150, Mr. Skinner concedes

that “sometimes a cow’s bag will be swelled from that “cause”, and then goes on to make a somewhat attenuated distinction between “puffed” and “swollen”, claiming in substance that while his cows’ quarters might have been “puffed”, yet they were not “swollen”. Garget, however, is itself a form of mammitis, and may arise, *inter alia*, from failure to strip the animals, or from roughness in their handling (191); and while garget may be described as a traumatic or non-infectious mammitis in the absence of pathogenic infectious germs—such as may be engendered by insanitary surroundings—yet where that germ is present, the garget may well become an influential factor in the origination or transmission of infection. Unless infection be present, such as may be generated by insanitary conditions, the form of mammitis known as infectious or contagious cannot be caused by trauma or produced mechanically: upon this proposition, all are agreed. Dr. Taylor, a very capable man, tells us that “The infectious mammitis is so called from the internal invasion of the mammary gland by an invading organism. Sporadic mammitis may be caused by congestion due to a traumatism or a general fevered condition of the animal, such as sometimes arises shortly after calving, and produces what is commonly called ‘caked udder’ and ‘caked bag’. These two form of mammitis present practically the same outward symptoms, but the infectious mammitis is characterized by the presence in the udder of some kind of an invading organism, and it is spread through the herd from one cow to the other. Sporadic mammitis generally affects one animal or possibly two in a

“ large herd, is not characterized by the presence of
 “ invading organisms in the affected udder and does
 “ not spread from animal to animal” * * * “The
 “ Sharples Separator Company’s milking machine could
 “ not, of or in itself, generate or cause infectious mam-
 “ mitis, unless proper care as to washing and steriliza-
 “ tion was not taken with the teat cup. It is not pos-
 “ sible to mechanically produce infectious mammitis”.
 “ * * * “From my examination of the milk teats
 “ and udders of Skinner’s cows, I do not think that
 “ the diseased condition which I found was caused by
 “ the use of the milking machine: I do not think so
 “ from the fact that the examination of the milk showed
 “ an infectious mammitis, as heretofore stated that the
 “ milking machine could not cause the diseased condi-
 “ tion which I observed at the time of my examina-
 “ tion” (182, 184, 185-6). Dr. Hart states, “mam-
 “ mitis is the general term covering all forms of inflam-
 “ mation of the udder; it is generally considered an in-
 “ flammation of the udder. There may be different
 “ kinds of mammitis; they may be divided into garget,
 “ or caked udder, mammitis or sporadic mammitis, and
 “ infectious mammitis” * * * “To settle the diag-
 “ nosis of infectious mammitis requires the presence
 “ of organism in the udder; no milking machine, nor
 “ any mechanical process, nor handmilking, can cause
 “ or create this organism. It is not possible to me-
 “ chanically produce infectious mammitis—not without
 “ the presence of the bacteria: bacteria may come from
 “ the hand of the milker, or from the teat cup of the
 “ milking machine, or from a pond in which the cows
 “ are allowed to walk through, or may be in the corral

“ in which they are allowed to lie down,—the same as
 “ any germ of any disease might get into the system”
 (190, 191-2). Mr. Kelly explains that “Mammitis is a
 “ general term for an inflammation of the mammary
 “ gland—the glands that produce the milk—the bag in
 “ general. Infectious mammitis is an inflammation that
 “ sets up in the udder, due to the invasion of some
 “ specific organism. All of the pus-producing organ-
 “ isms, principally the micrococcus variety, are gener-
 “ ally associated with infectious mammitis”. * * *
 “ Infectious mammitis almost invariably comes from
 “ external sources. The organisms that are contained
 “ in the udder are as a rule nonpathogenic, that is to
 “ say, those that are not disease producing in habit;
 “ that is, they are germs, but they are not such germs
 “ as produce disease. A pathogenic germ is a germ
 “ which must be or is actively producing and diseased.
 “ In case of infectious mammitis, the organism invades
 “ the udder through the teat ducts and is taken on to
 “ the teat or through some abrasion of the udder from
 “ some external source” * * * “I do not think
 “ there is very much doubt that in case a cow had
 “ traumatic or non-infectious injury, and there was
 “ present no pus generating germs, that upon proper
 “ treatment of the cow, the quarters so affected could
 “ be saved. My experience has been that traumatic
 “ mammitis is very easily overcome by proper treat-
 “ ment” * * * “If no pus generating, or infec-
 “ tion gets in, my experience is that the traumatic con-
 “ dition can be cleared up; I never knew of a cow dying
 “ from traumatic mammitis” * * *.

“I understand the manner in which a Sharples
 “ Milking Machine operates; in my opinion, the use of
 “ a milking machine with reasonable care and prudence,
 “ cannot cause infectious mammitis among a herd of
 “ dairy cows upon which it was being used. I base
 “ this view largely on the fact that I operated a
 “ Sharples machine on a large herd for a period of
 “ nearly two years; as to how large the herd was, at
 “ present, we are milking a little over 200 cows, about
 “ 206 cows; and it will be two years the first of De-
 “ cember that I have been using the Sharples machine.
 “ From my experience and observation, and use by
 “ myself of the Sharples Mechanical Milker over a
 “ period of two years upon a herd of cows as I have
 “ stated, I think the machine can be used successfully
 “ with cattle, without danger of injury to the cows pro-
 “ vided the dairy man is careful in operating the same”
 (209, 210, 211, 213-4). Mr. Van Denenden says: “I am
 “ familiar with swollen bags of cows, and have had
 “ occasion to treat them. I understand the theory and
 “ method and operation of the Sharples mechanical
 “ milker. My use of the Sharples mechanical milker
 “ has extended over 16 months. I have seen it oper-
 “ ated at more than one place. From my observation,
 “ in my opinion, the use of the Sharples mechanical
 “ milker, when properly operated, cannot injure the
 “ cows upon which it is used” (225). Mr. Felch re-
 marks on cross-examination that “In my opinion, it is
 “ not possible to injure cows with the Sharples mechan-
 “ ical milker producing a condition similar to mammitis,
 “ if you use it according to instructions—I do not think

“it is” (229). Dr. Ridder was a veterinarian produced by the plaintiff. He never made any bacteriological test of the milk of Mr. Skinner’s cows, nor did he ever examine Mr. Skinner’s cows (272). His testimony in chief was very halting: he seemed to be obsessed by the phrase “local irritation”; and upon being asked a hypothetical question, itself open to criticism, gave the following dubious and conjectural replies:

“A. What was the primary cause?

“Q. The primary cause.

“A. My impression is it was simply an irritation—
“local irritation.

“Q. Produced by what?

“A. Produced by—well, the milking machine; if it
“was not the milking machine the hands would pro-
“duce it, the same as the milking machine.

“Q. Would you say the cows had, under this state-
“ment, infectious mammitis, or not?

“A. If they did, it was secondary, due to some pri-
“mary cause” (271). On cross-examination, he ad-
mitted that “if abscesses appeared in the cows re-
“ferred to, belonging to plaintiff, and pus ran out of
“the teats, and there was a complete sloughing away
“of the whole quarter, I would certainly say that there
“would be an infection present” (271); and then added,
“You would have to have infection in order to have
“pus. Such condition certainly could result from a
“mere traumatic condition. The pus-producing organ-
“isms are present in absolutely every case, in my opin-
“ion, of normal conditions of the udder, and until the
“udder is placed in a susceptible condition where the

“germs will enter abrasions through irritation, the
 “udder has sufficient strength to resist infection until
 “there is an irritation. It may be possible for a
 “pathogenic micrococcus to attack a perfectly healthy
 “tissue under a violent condition; but there must, in
 “my opinion, be some infectious germ before it will
 “result in the form of pus and the sloughing away of
 “the quarters of the cow” (272). Dr. Cram, another
 of plaintiff’s veterinarians, found pus in the teats of the
 cows, concedes that it indicates the presence of a germ,
 confesses that he made neither a bacteriological nor a
 chemical analysis, and describes his opinion that the
 germs from Skinner’s cows were staphylococci, as a
 “presumption”—whatever that may mean. But Dr.
 Cram, also, adheres to the germ theory and to the
 doctrine of the transmissibility of bacteria from one
 cow to another, and he admits that a traumatic condi-
 tion, infectious germs being absent, is curable by proper
 treatment. Dr. Daudy never examined or treated Mr.
 Skinner’s cows, never visited Mr. Skinner’s place, and
 never made a bacteriological examination of the milk:
 he does not know what caused the injury: he does not
 know whether Mr. Skinner’s cows had infectious mam-
 mitis or not; and he was innocent of experience with the
 disease, because “I never treated a herd which was
 “afflicted with infectious mammitis” (280). But Dr.
 Daudy admits that the micrococcus is an infectious germ
 (278), believes that there was a bacterial infection, and
 concedes that infectious mammitis will spread among
 cows (280). And finally, Mr. McCulloch, though not
 a veterinarian, was questioned upon this subject. He

never was at Mr. Skinner's place, nor did he ever see Mr. Skinner's cows (289) , and it is perhaps unnecessary to add that it nowhere appears that, assuming his competency to do so, he ever attempted any bacteriological or chemical analysis; and he concedes that he has no knowledge as to whether Mr. Skinner operated his machine in accordance with instructions. He states that mammitis is an inflammation of the mammary gland (281), and that it is caused by "any injury inflicted upon the cow's udder" (282),—a point of view which, in opposition to the views of other competent men, would limit the origin of mammitis to some traumatism. He states that non-infectious mammitis can be caused by the use of the Sharples Mechanical Milker (282), but this is an undraped pronunciamiento, clothed by not even a tatter of a reason. And after describing personal experiences peculiar to himself, he condemns the mechanical milker, "even though all the instructions furnished by the company are strictly followed" (285). And the scope of Mr. McCulloch's acquaintance with this subject may be exemplified by the following passage: "As to whether it is impossible for mammitis to develop other than by the use of a machine, when a milker gets so abusive that he hurts the cow he is not milking" (287). And while Mr. McCulloch claims that non-infectious mammitis can be caused by the use of a Sharples Mechanical Milker (282), yet he further concedes that "the operation of any mechanical milking machine cannot cause infectious mammitis" (289),—from which the conclusion is obvious that if these cows were afflicted with

infectious mammitis, their affliction could not have been caused by the mechanical milker, but must be ascribed to insanitary conditions, tainted water, uncleanness, etc.

Taking the plaintiff's own view, it is a postulate in this cause that pus had formed in the teats—that “the udders were rotten and had a bad odor” (121-2): as Skinner states, “practically every cow that I claim sustained personal injury had a pus formation in the bag; that pus was not good stuff; it ruined the bags” (151-2); and this feature of the situation is further described by Skinner at pages 159-160, where he tells us of the effect upon the milk. He describes, also, the general condition of the cows in terms which show the presence of something more than a curable, non-infectious, traumatic mammitis, saying, “they would get into very bad condition; the cow would stand with her eyes and head drawn; she wouldn't get about much; her general physical condition seemed to be affected. It affected the udder first, but after the infection had been there for a few days, it seemed to have a general depressive effect on the cow. The udder was swollen, and the cows act very much like the udder was sore to the touch. I judged from the manipulation that the udder was sore to the touch. There was discoloration of the udder; it looked bruised—the tender part of the bag, the bruised part of the bag; the affected part of the bag would look bruised; the trouble seemed to be—well, it looked bruised all over. There had not been any milk from the cows whose bags were affected” (159); and Reed

adds to this by remarking that "the whole udder was swollen, there was high fever and individual cows were in very bad condition" (249). And Dr. Taylor, in describing the condition of the animals observes: "I consider that the bacteriological examination which I made of the milk drawn from the four cows owned by Mr. Skinner showed that they were suffering from infectious mammitis, due to the presence of large numbers of micrococcus already referred to. I examined the udders of each of the four cows from which the milk was drawn. As already stated, one-quarter of the udder of these four cows was affected with mammitis, the affected quarter being somewhat swollen, congested, hot and tender to the touch, and one quarter especially noted upon one of the animals contained a necrotic focus, a portion of which had sloughed out, producing a pit, from which pus was discharging. At the first attempt to draw milk from each one of these affected quarters, only a watery substance resembling whey was obtained, but upon manipulation of the udder a thick, semi-solid cheesy mass was obtained. As before stated, the first drawing of the milk was of a watery nature resembling whey. The milk drawn from the affected quarter had a sweetish, sickening odor * * *.

"In my opinion, the diseased condition of the udders of these cows had not been properly treated, due to the fact of the sloughing in the one case already mentioned. If suitable antiseptic washes had been administered at the onset of this trouble, I do not think the condition that I saw would have been present at

“ the time I made the examination. I do not think that
 “ the condition which I observed in the udders of these
 “ cows could have been produced by injury, unless the
 “ injured member was badly neglected and no treat-
 “ ment given” (182-3). And so, Mr. Kelly tells us,
 “ mammitis is a general term for an inflammation of the
 “ mammary gland—the glands that produce the milk—
 “ the bag in general. Infectious mammitis is an inflam-
 “ mation that sets up in the udder, due to the invasion
 “ of some specific organism. All of the pus-producing
 “ organisms, principally the micrococcus variety, are
 “ generally associated with infectious mammitis. Trau-
 “ matic mammitis is caused by some superficial injury;
 “ there is no pus-producing germ present in traumatic
 “ mammitis. If a number of cows in a herd have
 “ swollen quarters and the quarters are, in addition to
 “ being swollen, sore to the touch and are discolored,
 “ and in many instances abscesses form, and either the
 “ quarters slough away through abscesses, or pus runs
 “ out of the teat, and samples of milk from these cows
 “ are taken, a bacteriological test or examination made,
 “ and yellow micrococcus found, and an examination of
 “ the milk taken from the cows shows that it has at
 “ first, strains of a watery substance, and later a cheese-
 “ like substance comes out, and it has a sickish, sweetish
 “ smell, under those circumstances, I would look for an
 “ infectious form of mammitis” (209-210).

In this connection, it is proper to point out that con-
 tagious or infectious mammitis,—infection arising from
 insanitary surroundings, tainted water, uncleanness,
 etc., being absent,—cannot be caused by trauma or by

a mechanical process; and that the mechanical milker, being a mechanical process, will not, of itself, originate the affliction; and the cause of the affliction must be looked for elsewhere. Speaking to these points, Dr. Taylor states: "I do not think that the condition which
 " I observed in the udders of these cows could have been
 " produced by injury, unless the injured member was
 " badly neglected and no treatment given." * * * "I
 " understand that the Sharples Separator Company's
 " milking machine milks the cows by a process known
 " as the 'vacuum process'; other than that I do not
 " know the *modus operandi*. The Sharples Separator
 " Company's milking machine could not, of or in itself,
 " generate or cause infectious mammitis, unless proper
 " care as to washing and sterilization was not taken
 " with the teat-cup. It is not possible to mechanically
 " produce infectious mammitis" (183-184). Dr. Hart's views may be gathered from the following excerpt from the record: "To settle the diagnosis of infectious mam-
 " mitis requires the presence of organism in the udder;
 " no milking machine, nor any mechanical process, nor
 " hand-milking, can cause or create this organism. It
 " is not possible to mechanically produce infectious
 " mammitis—not without the presence of the bacteria:
 " bacteria may come from the hand of the milker, or
 " from the teat-cup of the milking machine, or from a
 " pond in which the cows are allowed to walk through,
 " or may be in the corral in which they are allowed to
 " lie down,—the same as any germ of any disease might
 " get into the system" (191-192).

“Q. In your opinion, Dr. Hart, after observing the
 “ manner in which the Sharples Separator Company’s
 “ milking machine operates and works upon the udders
 “ of a cow, state whether or not, in your opinion, if the
 “ machine is handled in a careful and proper manner,
 “ it would result in producing infectious or non-in-
 “ fectious mammitis?

“A. I have seen it operated without the production
 “ of that disease; the likelihood of producing such dis-
 “ eased condition would not be good; and if it were
 “ handled properly it could be operated without any
 “ infectious mammitis resulting.

“Q. State whether or not, in your opinion, if a
 “ Sharples milking machine were used in accordance
 “ with the book of instructions which has been furnished
 “ to the plaintiff, and which you have examined, would
 “ the operation of the machine under those conditions
 “ likely result in 20 or 30 out of 90 cows becoming per-
 “ manently injured for dairy purposes, by reason of the
 “ sloughing of the bag, or the forming of abscesses
 “ thereon?

“A. No, sir; it would not, if it was used by a man of
 “ ordinary intelligence, particularly the owner of a herd
 “ —the owner of the ranch, if he followed the instruc-
 “ tions. For instance, there are men of the type of
 “ milkers that are found around this country that even
 “ though they thought they were following the instruc-
 “ tions as given in this book by the Sharples Separator
 “ Company, he wouldn’t be following those instructions,
 “ and had no knowledge of mechanics, and that type of
 “ men are not considered sufficiently capable of handling

“ a milking machine, even though they are capable of
 “ hand-milking cows” (199-200). Mr. Kelly puts the
 matter thus: “I understand the manner in which a
 “ Sharples milking machine operates; in my opinion, the
 “ use of a milking machine with reasonable care and
 “ prudence, cannot cause infectious mammitis among the
 “ herd of dairy cows upon which it was being used. I
 “ base this view largely on the fact that I operated a
 “ Sharples machine on a large herd for a period of
 “ nearly two years; as to how large the herd was, at
 “ present, we are milking a little over 200 cows, about
 “ 206 cows; and it will be two years the first of Decem-
 “ ber that I have been using the Sharples machine.
 “ From my experience and observation, and use by
 “ myself of the Sharples mechanical milker over a
 “ period of two years upon a herd of cows as I have
 “ stated, I think the machine can be used successfully
 “ with cattle, without danger of injury to the cows, pro-
 “ vided the dairyman is careful in operating the same.
 “ I have operated that machine” (213-4).

“Q. You spoke of injured tissues being a better food
 “ for infectious or pathogenic germs. I will ask you,
 “ from your observation of the use of the Sharples
 “ milking machine at various places, whether or not
 “ it, if properly operated, injures the tissue of the
 “ udder?

“A. It does not” (223).

Mr. Van Denenden stated: “I have been in a position
 “ to observe whether or not it affects or destroys the
 “ tissues, and injures the tissues. According to my
 “ observation, it does not injure the teats or udders of

“ the cows. It cannot do it if you handle it proper. My
 “ experience with the use of the machine has been for
 “ 16 months. I got just as much milk from the cows
 “ by milking with the machine as I did by hand; just as
 “ much or more” (225). Mr. Felch also agrees: “From
 “ my observation and experience, the Sharples mechani-
 “ cal milker can be used upon a herd of dairy cows by
 “ proper use and management, so as not to result in
 “ injury to the cows; I know this from experience; I
 “ have used it three years and had no injury to the
 “ cows” (228). “In my opinion, it is not possible to
 “ injure cows with the Sharples mechanical milker, pro-
 “ ducing a condition similar to mammitis, if you use it
 “ according to instructions—I do not think it is” (229).

Mr. Boarts, one of plaintiff’s Imperial Valley rebuttal witnesses, states that “In my opinion, the Sharples
 “ separator machine was not a successful machine; the
 “ machines under my observation have failed to milk
 “ the cows without injury to the cows” (260): but how
 much of this lack of success is to be attributed to the
 machine itself and how much to the operator, Mr. Boarts
 fails to state: he certainly does not attribute the entire
 lack of success to the machine itself because when
 asked on cross-examination, “If it had not hurt your
 “ cows, you would have no complaint about your
 “ machine and the way it operated” he replied “I am
 “ not certain about that” (261); and in view of this
 exhibition of titubation, we quite concur in Mr. Boarts’
 declaration of non-infallibility (260). Between Mr.
 Boarts and Dr. Ridder, there appears to be a schism.
 The single concrete explanation offered by Mr. Boarts

for the lack of success of the machine was that “it did not draw the milk” (261); and although Mr. Boarts claims that the milker did not perform its mechanical functions all right, yet this is but an unexplained conclusion thrown in to impart an air of verisimilitude to an otherwise bald and unconvincing narrative,—indeed, Mr. Boarts was in no position which would authorize him to say in opposition to everybody else that the machine was mechanically wrong, because he confesses, that he was without knowledge of the subject-matter, saying “I am unable to state to the jury what part “ of the machine was wrong, or I would have corrected the trouble” (260-1). But while Mr. Boarts’ one asserted reason was that “it did not draw the “ milk”, yet, not only does Mr. Skinner concede that “ this machine would draw the milk out from the cows” (158), but no such reason was given by Dr. Ridder: here, the house became divided against itself; and Dr. Ridder takes the ground that the machine was not successful because it produces mammitis—“They were “ not successful on account of the irritation—the constant suction producing irritation on the udder; it “ hurts the cow’s teats; it sets up an inflammation—“ mammitis” (267)—a view quite out of line from the whole stress and burden of the testimony. It does not appear that Dr. Cram ever saw a mechanical milker in actual operation, or had any views to offer as to its success or failure. Dr. Daudy’s experience with the milker was “little” (277): he is even uncertain as to where he had it—“*I think* it was at Mr. Boarts’ “ ranch” (277): his understanding of the principle of

the machine is merely “rough” (id.): his knowledge as to the specific adjustments of the machine to the particular cow, is not original, but mere hearsay (278); and certainly a mental condition of this tenuity cannot impart any impressiveness to any opinion of his. But even Dr. Daudy does not agree that the machine was a failure, or that “it did not draw the milk”, or that it caused mammitis, or that it produced “an infectious “condition” (279),—the only view that he expresses being that the teat was “bruised” by the teat-cup—a mere trauma readily attributable to the inconsiderate action of two inexperienced boys. And the divergence of opinion among plaintiff’s witnesses upon this point becomes more accentuated when we turn to plaintiff’s witness McCulloch: the nebulous generality of Mr. Boarts that the machine did not properly perform its mechanical functions, is fully met by Mr. McCulloch’s statement that “my machine worked all right from a “mechanical standpoint; it was mechanically perfect” (289); and the preposterous claim of Dr. Ridder that the machine generated mammitis is overthrown by McCulloch’s statement that “The operation of any “mechanical milking machine cannot cause infectious “mammitis” (id.). It may not be improper to add that the depositions of five residents of Salt River Valley, near Phoenix, Arizona,—a valley whose climatic characteristics do not appear to differ from those of Imperial Valley (228)—supported the Sharpless mechanical milker and disclaimed injury to cattle from its use; and that the negative (*Paauhau S. P. Co. v. Palapala*, 127 Fed. 920, 925) depositions of five dairymen of Imperial Valley, who had used the milker for various

limited periods "from two weeks to a year" (291), were to the effect that *they* were unable successfully to operate the machine, or make it operate successfully (289-291). We submit that the inability of these Imperial Valley dairymen to accomplish a given result is no proof whatever that the result cannot be accomplished, if the proper course is pursued; and the mind harks back to the very suggestive criticism of Dr. Hart:

"Q. State whether or not, in your opinion, if a
 " Sharples milking machine were used in accordance
 " with the book of instructions which has been fur-
 " nished to the plaintiff, and which you have examined,
 " would the operation of the machine under those con-
 " ditions likely result in 20 or 30 out of 90 cows becom-
 " ing permanently injured for dairy purposes, by rea-
 " son of the sloughing of the bag, or the forming of
 " abscesses thereon?

"A. No, sir; it would not, if it was used by a man
 " of ordinary intelligence, particularly the owner of a
 " herd—the owner of the ranch, if he followed the
 " instructions. For instance, there are men of the
 " type of milkers that are found around this country
 " that even though they thought they were following
 " the instructions as given in this book by the Sharples
 " Separator Company, he wouldn't be following those
 " instructions, and had no knowledge of mechanics,
 " and that type of men are not considered sufficiently
 " capable of handling a milking machine, even though
 " they are capable of hand milking cows" (199-200).

For a man injured as Skinner claims he was, he has exhibited extraordinary indifference, not only in pre-

senting his alleged grievances to the company, but also in presenting them to the courts. Briggs arrived at Skinner's place on October 20, 1914 (122, 167, 173): but although "before the time when Briggs came, there "were 20 cows ruined" (124), yet not one word of remonstrance reached the company—as Skinner puts it, "When Mr. Briggs came in the fall, I had not notified "anybody then" (162). Mr. Skinner claims that he make complaints to Edgar Bros., and to Reed or Briggs, but there is nothing to show that he ever followed up these alleged complaints: on the contrary, he never got into touch with any of the officers of the company until "After I discontinued the use of the machine" (162). Nor did Mr. Skinner exhibit any anxiety to seek redress by suit. The milker has not been operated since December 20, 1914 (134), but the complaint was not filed in the State court until July 6, 1915 (15)—over six months later; and while the alleged cause of action may not, perhaps, have been barred by limitations, yet this delay is among the items giving character to Skinner's attitude,—if he had really been griveously injured in the mode that he claims, one would have expected a prompter appeal to the courts.

When Skinner finally did appeal to the courts, he formulated his claims in his amended complaint. He sued both this plaintiff in error and the Edgar Bros. Company, claiming damages in the sum of \$4512. After alleging the corporate character and occupation of the Sharples Separator Company and the Edgar Bros. Co., Mr. Skinner describes himself as a farmer and dairyman in Imperial County, California, who, on

January 2, 1914, purchased a Sharples mechanical milker consisting of three milker units. He then alleges that "the defendants" * * * "then and there warranted the same to be in all respects fit and proper for the said use of milking plaintiff's said cows and especially warranted that when said Sharples mechanical milker had been installed on plaintiff's ranch by defendants, it could be safely used for milking plaintiff's said cows and that the use thereof in milking said cows would not in any way injure said cows nor decrease the amount of milk said cows would give if said mechanical milker was operated and cared for in accordance with defendant's instructions" (60); he states that he had no information or knowledge concerning mechanical milkers other than the statements of the "defendants"; that he was without ability to ascertain the integrity of "defendants'" representations and warranties before buying, and that he believed the representations of "defendants", relied upon "their" warranties, and made the purchase solely "by reason of said representations and warranties",—this last allegation being, however, quite without support in the evidence, as we read the transcript. The installation of the mechanical milker on the plaintiff's ranch is then described, and it is stated that the "defendants declared to plaintiff that the said mechanical milker was then and there completely and properly installed and that he could thereafter safely use and operate it for milking plaintiff's said cows and that if operated and cared for in accordance with defendant's instructions, the same

“ would not in any way injure plaintiff’s said cows
 “ nor decrease the amount of milk said cows would
 “ give” (61). The purchase of the fourth unit is then
 taken up by the plaintiff: he does not give us the date
 of the purchase, though he does tell us that “about
 “ May 6, 1914,” this fourth unit was delivered: but he
 does state that the purchase of the fourth unit was
 made “before plaintiff had discovered that said mechan-
 “ ical milker was injuring his said cows”; and he
 admits that after the delivery of this fourth unit,
 it was “thereafter operated together with the other
 “ three units, as one milker”. He claims, of course,
 that the same warranties and representations were
 made to him regarding this fourth unit as had been
 made to him regarding the original three units, an
 allegation which finds no support in the evidence, as
 we read the transcript. The plaintiff then goes on to
 describe his user of the mechanical milker, claiming
 that he operated it in strict conformity to and in
 compliance with all of “defendants” instructions: but
 alleges that the milker was not proper to be used for
 milking, and that the use thereof bruised and injured
 the teats, udders and bags of many of his cows, and
 greatly lessened the amount of milk given by them;
 and that as soon as he discovered that the milker was
 injuring his cows, he discontinued its use upon cows
 showing injury from its use. He claims that on
 May 30, 1914, he notified “defendants” of his effort
 to use the milker, but that the milker was insufficient
 and that “it did not in any respect comply with their
 warranties”,—an allegation which finds no support

in the evidence as we read the transcript, the plaintiff testifying that “when Mr. Briggs came in the fall “ (October 20, 1914), I had not notified anybody then” (162), although before the time when Briggs came, “there were twenty cows ruined” (124).

The planitiff then takes the position that his asserted notification of May 30, 1914, was productive of results so far as the company was concerned,—that this notification originated a certain action by the “defendants” which the plaintiff alleges in succeeding paragraphs of his amended complaint; and this, quite regardless of the fact that “when Mr. Briggs came in the fall (October 20, 1914), I had not notified anybody then” (162). The assertion of the plaintiff is that upon receiving this impossible notice of May 30, 1914, the “defendants” repeated their former representations and warranties and asserted that the mechanical milker had not been given a fair trial, and insisted that they, “defendants”, be permitted to operate the milker upon the cows, and again represented that if the milker were properly operated it would not in any way injure the cows: but how “the defendants” could have taken this position in consequence of the alleged notice of May 30, 1914, when the fact was that Mr. Skinner had not notified anybody prior to the advent of Mr. Briggs on October 20, 1914, is, we must confess, quite beyond our comprehension. However, Mr. Skinner goes on to say that on June 25, 1914, “the defendants themselves”, began to operate the milker and so continued for about two weeks, but were unable so to operate it as to avoid injuring the cows, but, on the contrary, “did greatly in-

“jure said cows and permanently ruined many of them “for any and all purposes whatever”, abandoning their attempt on July 7, 1917. It is then alleged that the plaintiff again notified “defendants” that the mechanical milker was useless, and offered to return it to them, and demanded that they return to him the purchase price and damages for injuries done by its operation:—an allegation which we find great difficulty in reconciling with Mr. Skinner’s sworn testimony that prior to the advent of Mr. Briggs he had not complained to anybody.

It is then alleged that about October 20, 1914, “defendants” again asserted that this mechanical milker was a proper machine, represented that it could be successfully operated, and insisted upon another trial, “and “again represented and warranted that the mechanical “milker would not in any way injure plaintiff’s said “cows and agreed to pay to said plaintiff all damages “caused his cows by said mechanical milker”. And here, too, the only apparent attempt to support this allegation is, as we read the record, to be found in what for brevity we may call the Briggs’ contract, a contract which was ruled out by the learned judge of the court below, and which will be discussed more at length hereafter. The plaintiff then tells us that he consented to another trial of the mechanical milker, and that on October 20, 1914, “defendants” again began its operation, and so continued until the 18th day of December, 1914. The plaintiff repeats his claim that the milker injured his cows and permanently ruined many of them for all purposes whatever. He tells us that on Decem-

ber 18, 1914, the operation of the milker was discontinued by "defendants", and the same has not been used since. He then claims, generaliter, that the mechanical milker was useless and of no value, and that on December 18, 1914, he notified "defendants" of the insufficiency of the milker, offered to return it, and demanded its purchase price and the damages sustained by him. He then proceeds to allege his damage, commencing with the claim that his herd was healthy, well bred and free from disease; and alleges that two of the cows died to his damage in \$300, five were ruined to his damage in \$675, ten were ruined for dairy purposes to his damage in \$370, ten more were injured to his damage in \$300, making his total damage aggregate \$2.005. He further alleges a loss of butter fat received from the cows amounting to 6000 pounds, to his damage in \$1500. And he further alleges that he paid "defendants" in the purchase and installation of the mechanical milker \$1007. He prays judgment therefor for \$4512.00, and his costs.

During the course of the trial, this complaint was amended by setting up that by reason of the injuries to his cows, the plaintiff was obliged to pasture eight of them for a period of twelve months to his damage in the sum of \$132.00, and six of them for a period of 24 months to his damage in the sum of \$288.00. and in this amendment it was further alleged that the reasonable value of the milker to the plaintiff was nothing whatever, but if it had complied with the warranty given at the time of the purchase thereof, it would have been of the reasonable value of \$1000. By stipulation entered

into during the course of the trial (128), this amendment, which was allowed over the objections of the present plaintiff in error, was agreed to be deemed denied.

In due time, the present plaintiff in error came in with its answer, the burden of which was a denial of the case sought to be made by the plaintiff in his amended complaint. The company admitted that about January 2, 1914, it sold to Mr. Skinner, under a contract in writing, a mechanical milker, consisting of three milker units, but denied making any warranty such as was claimed by Mr. Skinner. This answer then goes on and specifically denies the various claims and assertions contained in Mr. Skinner's amended complaint, and denies that Mr. Skinner paid for the purchase or installation of the milker the sum of \$1007, and denies his claim of damages for \$4512, or any other sum. This answer then sets up a further and affirmative defense to the amended complaint and to each and every of the allegations thereof. In that behalf, it is alleged:

“I.

“That prior to the commencement of this action defendant agreed to sell to plaintiff and plaintiff agreed to buy from defendant a Sharples milker equipment consisting of a pump and three units installed complete less transportation charges on outfit, power, belting, counter-shafting, etc., not included in said equipment; that it was further agreed by and between plaintiff and defendant that said sale was made with the understanding that the plaintiff would have the machine operated and cared for in accordance with defendant's instructions; that the machine would be kept in good order mechanically; that pressure and vacuum would be maintained in accordance with defendant's instructions; that the cows would be carefully and thoroughly stripped after each milking and that the machine would be thoroughly cleaned after each

milking and that all reasonable precautions tending to the production of clean milk would be observed.

“II.

“That thereafter defendant furnished plaintiff with instructions for the operation of said machines; that plaintiff failed to clean said machines after each milking and said plaintiff failed to observe reasonable precautions tending to the production of clean milk, and that plaintiff maintained and kept the said dairy, barn and premises in an unclean and unsanitary condition, and that if any injuries were inflicted upon the plaintiff’s cows as alleged in plaintiff’s complaint, said injuries were the result of the unclean and unsanitary condition of said barn and of said premises, and of the failure of said plaintiff to take reasonable precautions for keeping said premises in a proper and sanitary condition.

“III.

“That it was further agreed by and between plaintiff and defendant that defendant would replace any parts of said Sharples milker equipment found to be defective in workmanship or material, provided written notice thereof was sent to this defendant by the purchaser and said defective part was returned within one year from the date of said purchase; but that said defendant would not replace any parts found to be defective as a result of ordinary wear and tear, accidents, or abuse; that plaintiff failed to send defendant written notice of any defects in said machine due to workmanship or materials and that if any damages arose from the use of said machine said damages were caused by the abuse of said machine by plaintiff.”

The Edgar Bros. Company, the other defendant, also filed an answer wherein, after admitting its corporate character and occupation, and that “it handled the goods of the Sharples Separator Company”, it denied that at the time of any sale to the plaintiff of a mechanical milker, it handled or was engaged in selling the mechanical milker manufactured by the Sharples Com-

pany. And this answer then goes on and takes up the various allegations of the amended complaint, and denies the same.

It was upon these pleadings, that the trial was had. The case in chief on behalf of the plaintiff was sought to be supported by his own testimony, that of his wife, and that of his son. When the plaintiff rested, this plaintiff in error produced Dr. Taylor, an expert veterinarian professionally employed by the United States Government, and Dr. George Hart, likewise an expert veterinarian, and city veterinarian for the City of Los Angeles, and Mr. Lynwood Kelly, superintendent of the Shore Acres Dairy, Mr. Van Denenden, professional dairyman of Corcoran, California, and Mr. Felch, a professional dairyman of Salt River Valley, in Phoenix, Arizona, and also the testimony of Mr. F. L. Briggs, Mr. A. Edgar, president of the Edgar Bros. Company, and the deposition of Mr. Reed, taken for and on behalf of the plaintiff, and the testimony of Mr. Frank, salesmanager of the present plaintiff in error. In rebuttal, the plaintiff produced Mr. Boarts, an Imperial Valley dairyman, Mr. Nye, also an Imperial Valley man, and an inspector for the State Dairy Bureau, and Mr. Rogers, also an Imperial Valley man, who had been inspector for the State Dairy Bureau and county health officer, and Dr. Ridder, a veterinary, and also an Imperial County man, and Dr. Cram, a veterinary, and also an Imperial County man, and Dr. Daudy, a veterinarian, and also an Imperial Valley man, and A. G. McCulloch, another Imperial Valley dairyman. Depositions of five dairymen from the Salt River Valley, near Phoenix,

Arizona, commendatory of the mechanical milker, were stipulated into the record on behalf of the present plaintiff in error, showing their successful use of the Sharples mechanical milker; and on behalf of the plaintiff, the depositions of five other persons, all of whom were, like the plaintiff's other witnesses, Imperial Valley men, and all of whom were Imperial Valley dairymen, were stipulated in the record, to show their inability to operate the milker or make it operate without injuring their cows, and that they sustained a shortage of milk during the year of 1914, these dairymen using the milker for uncertain periods ranging from two weeks to a year. Certain paragraphs from the plaintiff's bill of particulars, were then read into the record. It was further stipulated that Mr. Skinner testified that \$480 was the reasonable market value which he placed upon the pasturage of the injured cows from the time of their injury until the time of their sale, and here, the testimony was closed. The trial resulted in a verdict for the plaintiff; and thereupon the present plaintiff in error sued out this writ.

ASSIGNMENT AND SPECIFICATION OF ERRORS.

I.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that there is no evidence upon which said jury could find that the milking machine furnished by the defendant in said action, caused the injury shown to have been sustained by plaintiff's cows.

II.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this (341): that the plaintiff failed to introduce any evidence from which the jury might determine the amount of injury or loss, if any, that was sustained by plaintiff from the use of the three units purchased from the defendant, and the one unit purchased from Edgar Brothers Company.

III.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that the preponderance of the evidence shows that the injury actually resulting to plaintiff's cows, and the consequent loss of milk, if any, was due to the invasion of an infectious disease, not produced or caused by the operation of the machine furnished by the defendants.

IV.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this that the preponderance of the evidence shows that the plaintiff's cows were affected with an infectious disease, and that such infectious disease was not and could not have been caused by the operation of the milking machine furnished by the defendant.

V.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that the evidence does not show that the plaintiff was damaged in the amount found by the jury (342).

VI.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that the preponderance of the evidence shows that a large part of the damage sustained by the plaintiff's cattle resulted from a lack of proper care and treatment thereof by the plaintiff and that had said plaintiff treated said cows in a proper and careful manner, a large part of the injury sustained by said cattle would have been prevented.

VII.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that the preponderance of the evidence shows that the defendant committed no breach of warranty, and that whatever damage was suffered by the plaintiff was the result of other causes than the operation of the milking machine furnished by the defendant.

VIII.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against

the law and the evidence, because of errors of law occurring during the trial and excepted to by the above-named defendant and hereinafter included in these assignments of errors.

IX.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the law and the evidence, because of the insufficiency of the (343) evidence to justify said verdict and/or judgment, the particulars of such insufficiency being included in these assignments of errors.

X.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the law and the evidence, in this, that the preponderance of the evidence shows that the damage sustained by plaintiff's cattle resulted from the invasion into the udders of said cattle of an infectious disease, not caused by the operation of the milking machine furnished by defendant, and the jury were instructed by the court that the defendant was not liable for such damage resulting from such infectious disease.

XI.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the law and the evidence, in this, that the amount of damages awarded the plaintiff by the jury is excessive, and finds no support in the evidence, and is contrary to the instructions of the court, in that the jury in arriv-

ing at the amount of damages stated in its verdict awarded plaintiff damage not only for the injury sustained by his cattle, but also for loss of milk; and also allowed the plaintiff for the injury, if any, which resulted to his cattle from the use and operation of the fourth unit purchased by him from Edgar Brothers.

XII.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the (344) charge of the court to the jury in said action, in this, that the jury awarded the plaintiff damages which resulted from the use and operation of the fourth unit of the milking machine which was purchased from Edgar Brothers, in violation of the instructions of the court that the defendant was not liable for such damage.

XIII.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the charge of the court to the jury in said action, in this, that in arriving at the verdict the jury duplicated damages in allowing to the plaintiff full value for all cows claimed by him to have been injured, and also allowing to the plaintiff a sum of money for loss of butter fat, and for pasturage of his cattle after the alleged injury occurred, and in so doing the jury disregarded the instructions of the court, that it should not, in arriving at its verdict, duplicate damages.

XIV.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against

the charge of the court to the jury in said action, in this, that the evidence shows that the damage resulting to plaintiff's cattle, and the consequent loss of butter fat or milk, if any, was the result of the invasion into the udders of plaintiff's cattle of an infectious disease, and under the instructions of the court the plaintiff was not entitled to recover anything for damages resulting from said cause. (345).

XV.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the charge of the court to the jury in said action, in this, that the evidence shows that a large part, or all of the damages sustained by plaintiff's cattle, could have been prevented had the plaintiff given to said cattle prompt and careful treatment, and under the instructions given by the court the defendant could not be held liable for damages which might have thus been prevented by prompt and careful treatment of the cattle by the plaintiff.

XVI.

Said court erred in overruling the objection of said defendant to the introduction in evidence before said jury of the following printed matter:

“A lifetime study in the dairyman's interest enabled these experts to solve the apparently impossible problem of automatic or mechanical milking”.

“The gentle massage of the teat-cup with its uniform action induces the cows to let down the milk freely, a condition which frequently increases milk production”.

“The teat-cup with upward squeeze always is soothing, even tempered, never in a hurry. After drawing each squirt of milk it gently massages the cow’s teats, keeping the teats and udder of the most delicate or hardiest cow in a soft, cool, natural, perfect condition, free from congestion”.

“By the proper use of this all important feature, which is obtainable only in the Sharples milker, the teats and udder of either the most delicate or the most hardy (346) cows are kept in a soft, cool natural condition. Until we made this discovery, we never thought of offering a machine for sale, though long before that time we were owners of patents on the best pulsating suction milkers ever devised”.

“These statements merit special consideration. They are conservative—”

Said objection was made upon the grounds that said printed matter was incompetent, irrelevant and immaterial, and upon the ground that the present cause was a case of a written warranty; said objection was then and there overruled by said court, and said printed matter was then and there received and read in evidence to said jury, to which ruling and action of said court, said defendant then and there duly excepted; and said defendant now assigns said ruling as error.

XVII.

Said court erred in overruling the objection of said defendant to the introduction in evidence before said jury of the following printed matter:

“The Sharples mechanical milker is quite different from others which give the teats an upward squeeze, which not only absolutely prevents all irritation of teats and udders but actually benefits the cows and improves the flow of milk”.

Said objection was made upon the grounds that said printed matter was incompetent, irrelevant and immaterial, and upon the ground that the present cause was a case of a written warranty; said objection was then and there overruled by said court and said printed matter was then and (347) there received and read in evidence to said jury, to which ruling and action of said court, said defendant then and there duly excepted; and said defendant now assigns said ruling as error.

XVIII.

Said court erred in overruling the objection of said defendant to the introduction in evidence before said jury of the following printed matter:

“Q. Is it safe to milk high-grade cows with the milker? A. This question has already been answered pretty thoroughly. The high-grade cow is much safer when milked by the Sharples milker than when milked by hired help, and just as safe as when milked by the owner himself.

“Q. Does it not have a harmful effect on some cows? A. From our knowledge of what the milking machine has accomplished on the 80,000 cows upon which it is used daily, we know that the Sharples milker has a tendency to increase the production of milk. Of some cows it does not seem to increase the production, of others it increases it anywhere up to 10%.

“If the hand milkers have been poor, the Sharples milker practically always shows an increase in milk production. The reason for this is that the ‘upward squeeze’ keeps the teats in perfect condition. The cows are milked with an even and regular motion studied by us and made correct. If the hand milkers were very good it is probable that the machine will not be able to improve upon them; otherwise, the probabilities are that it will. We know

positively that the Sharples milker never has an ill-effect upon the cows, provided the machine is kept in reasonable (348) order, and we keep enough experts out on the territory to see that all dairymen do keep their machines in good order.

“There is not the least tendency to dry up the cows prematurely nor have any other harmful effect”.

Said objection was made upon the grounds that said printed matter was incompetent, irrelevant and immaterial, and upon the ground that the present cause was a case of a written warranty; said objection was then and there overruled by said court and said printed matter was then and there received and read in evidence to said jury, to which ruling and action of said court said defendant then and there duly excepted; and said defendant now assigns said ruling as error.

XIX.

Said court erred in receiving, and in denying the motion of said defendant to strike out, the following answer and statement of said plaintiff during his direct examination, to-wit:

“They was to send this demonstrator there once a month to go through my herd and see if everything was working all right”.

Said motion to strike out was made upon the grounds that the statement of the witness as to the duties on the part of said defendant, was incompetent; said statement and answer of said witness was then and there received and given in evidence to said jury, to which ruling and action of said court said defendant then and there duly

excepted; and said defendant now assigns said ruling as error (349).

XX.

Said court erred in receiving, and in denying the motion of said defendant to strike out, the following testimony as given by said plaintiff during his direct examination as set forth in defendant's bill of exceptions, exception Number 5, as follows:

“The WITNESS. I can't well state what he did without I tell you what passed between us. Briggs, he wanted to start the machine again, and I would not agree to it.

Mr. PARKE. We move to strike that out, as to what Briggs wanted to do”.

Said motion to strike out was then and there denied by the court, to which ruling said defendant, Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

XXI.

Said court erred in overruling defendant's objection to the following testimony as set forth in defendant's bill of exceptions, Exception Number 6, as follows:

“The WITNESS. I finally agreed that if they would take charge of the machine on thirty cows—

Mr. PARKE. If the court please, we object to any agreements entered into by and between Skinner and Mr. Briggs, or anything in the nature of a warranty; this machine was sold on a written warranty. Briggs had no authority to contract”.

Said objection was then and there overruled by the court, to which ruling said defendant, Sharples Sepa-

rator Company then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as (350) follows:

“The WITNESS. Briggs wanted to start the machine; I told him I would not let him do it; that was first; he then came back again; he and I went to Mr. Edgar Bros. and we came to an agreement; and we came to an agreement; that is the writing I entered into; my signature is at the bottom there; that is my signature; this H. S. King is Mr. Edgar Bros. man—I desired a witness; but for my receiving this written paper I would not have allowed Reed to re-start the machine”.

XXII.

Said court erred in permitting the plaintiff to amend his complaint, as set forth in defendant’s bill of exceptions, Exception Number 7, as follows:

“The COURT. You may amend your complaint, if you wish to. The objection is overruled.

Mr. PARKE. Note an exception”.

To which ruling said defendant, said Sharples Separator Company, then and there duly excepted, and now assigns said ruling as error.

XXIII.

Said court erred in overruling the objection of said defendant to the following question addressed to the plaintiff during his direct examination, as set forth in defendant’s bill of exceptions, Exception Number 8, as follows:

“Q. Did you suffer any loss as the result of the operation of this milker upon your herd in the quantity or amount of milk or butter fat you received from that herd?”

Said objection was made upon the ground that said (351) question called for a conclusion of the witness. Said objection was overruled by said court, to which ruling said defendant then and there noted an exception, and now assigns said ruling as error. Thereupon, the witness testified as follows:

“I did”.

XXIV.

Said court erred in denying defendant's motion to strike out testimony as set forth in defendant's bill of exceptions, Exception Number 9, which said motion is as follows:

“Mr. PARKE. The Sharples Separator Company, a corporation, moves to strike out all of the testimony of the witness on the value of the milk, as stating a mere conclusion”.

Said motion was then and there denied by the court, to which ruling said defendant, Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error. Said testimony so retained was as follows:

“The WITNESS. The milk that I lost by reason of this amounts, I think, to \$1500—the value of it”.

XXV.

Said court erred in permitting said plaintiff to file an amendment to his amended complaint, as to damages, as set forth in defendant's bill of exceptions, Exception Number 10.

Said defendant objected to the filing of said amendment on the ground that it attempts to set out elements

of damage not set out in the original complaint, or in the (352) bill of particulars furnished by the plaintiff; and upon the ground that this defendant has had no opportunity of investigating the question of damage set out in the amendment; and that at this time the plaintiff should not be permitted to insert other and different claims for damages than those covered by his original bill of particulars and complaint.

Said objection was then and there overruled, by said court, and said amendment permitted, to which ruling and action of said court, said defendant then and there duly excepted and now assigns said ruling as error.

XXVI.

Said court erred in overruling defendant's objection to the testimony as set forth in defendant's bill of exceptions, Exception Number 11, as follows:

“The COURT. Q. Did you consent to its being used on your cows by reason of what Briggs induced you to do?

Mr. PARKE. I dislike to object to the court's questions but we object to the question as to the conditions under which he started the use of the machine”.

Said objection was then and there overruled by the court, to which ruling said defendant, said Sharples Separator Company, then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“The WITNESS. Yes, sir. In October the machine was used practically two months, and a man by the name of Reed operated it. I did not employ Reed. Mr. Reed came and took charge of the ma-

chine on a string of cows. Mr. Reed and (353) Mr. Briggs were there when the machine started, and they selected their cows that had not been injured, young cows, and then selected a herd that they thought the machine would milk. I don't know that they thought that. At least, they picked such cows as they wanted. I had nothing to do with it. I told them to pick the herd and get just such cows as they wanted. I had nothing to do with selecting the cows. The machine had gotten dirty. They took those things and boiled them, and put in new rubbers, and started them up on those thirty cows. Mr. Reed had absolute control of it. I had nothing to do with it at all. It had not been there but just a little *but*, and a cow came into the corral with one of those bad quarters. I had cows that had not been milked with the milker in that herd. There were two strings. Some of those cows had had a milker on them in June and July. I had cows that this milker was not put on at any time. It is a hard question to answer, how many. I had some young cows. No cows got diseased that were not milked with the milker. Up to July they milked all the cows with the milker. I had some cows that came in after that that were not milked with the milker, but they selected some of those cows that had come in, young cows, and put the machine on them in October and November. After October seven of the cows were hurt and some of them injured. I only claim those absolutely ruined for dairy purposes. Some of them were injured that I put in no claim for. And as to the value of those cows what I say were ruined, I would have to get my instructions out again to segregate those different cows'' (354).

XXVII.

Said court erred in overruling defendant's objection to the testimony as set forth in defendant's bill of exceptions, Exception Number 12, as follows:

“Mr. SWING. Q. With reference to the guarantee which he gave you, or purported to give you at the time he consented to restarting the milker, I will ask you if at any time since you have ever received any notice or intimation from the company that that was not a valid contract or guarantee?

Mr. PARKE. We object to the question—that a guarantee was given by Briggs; and if that alleged contract was not binding upon the company, it would not make any difference whether they ever repudiated it or not, if there was no consideration therefor”.

Said objection was then and there overruled by said court, to which ruling of the court the defendant, said Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“The WITNESS. They did not notify me”.

XXVII.

Said court erred in overruling defendant’s objection to the testimony set forth in defendant’s bill of exceptions, exception Number 13, as follows:

“The COURT. Did they ever notify you that Briggs was not their agent and had no authority to do what he did do?

Mr. PARKE. We object to the question upon all of the grounds heretofore stated”.

Said grounds are stated in assignment of error number XXVII (355).

Said objection was then and there overruled by the court, to which ruling said defendant, said Sharples Separator Company, then and there duly excepted, and now

assigns said ruling as error. Thereupon the witness testified as follows:

“The WITNESS. No, sir”.

XXIX.

Said court erred in receiving, and in refusing to strike out the answer of the witness “No, sir” to the question, “Did they ever notify you that Briggs was not their agent and had no authority to do what he did do during the direct examination of said plaintiff”, as set forth in defendant’s bill of exceptions, Exception Number 14.

Said motion was made upon the grounds that no alleged contract by Briggs was binding upon the company, and that it would not make any difference whether the company repudiated it or not if there was no consideration therefor.

Said motion to strike out was then and there denied by said court, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

XXX.

Said court erred in overruling defendant’s objection to the testimony set forth in defendant’s bill of exceptions, Exception Number 14-A, as follows:

“Mr. SWING. Q. At the time Albert J. Reed quit, if he did, on December 20, state what, if anything, he said at the time he quit? A. When Mr. Reed quit? (356)

Q. Yes.

Mr. PARKE. We object to that as incompetent, irrelevant and immaterial, and there is no evidence before the court of any kind, nature or description,

that Reed was the agent of the Sharples Separator Company”.

Said objection was then and there overruled by the court, to which ruling said defendant, said Sharpless Separator Company, then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“The WITNESS. The first intimation that I had that Mr. Reed was going to quit, I walked into the corral, and there was one of the cows showed she was not feeling good, and I was in a hurry and was going to the ranch, and I said, ‘Mr. Reed, is that cow sick?’ He said, ‘Look at her bag’. And I just stopped, and it was a heifer, and the bag was all swollen up. And I didn’t say a word, and Mr. Reed didn’t, for a half a minute, and then Mr. Reed said ‘Skinner, I am going to quit. I have ruined the last cow with this machine that I expect to ruin’. He quit, and I took him to town, and after he got to town, the first thing he did, he went in and talked to Mr. Edgar. He made, in my presence, a statement to Mr. Edgar regarding his ability or inability to run the machine.”

XXXI.

Said court erred in overruling defendant’s objection to the testimony set forth in defendant’s bill of exceptions, Exception Number 15, as follows:

“The WITNESS (continuing). Reed quit. After he went to town he sent Mr. Frank a telegram. I saw the telegram written. It was written by Mr. Reed.

Q. Do you know his handwriting, or are you able to (357) identify that? (Handing a paper to the witness.) A. It is very much like it; I believe it is.

Mr. SWING. We offer now in evidence the copy written by Reed, which is attached to this deposi-

tion, which Reed testified is his handwriting, and which he wrote, and also the original furnished by the company, which is word for word like this. I offer the two.

Mr. PARKE. We object to that as incompetent, irrelevant and immaterial, and further that no evidence is before the court that Reed was an agent for the Sharples Separator Company, or any other employee at this time”.

Said objection was then and there overruled by said court, to which said ruling said defendant, Sharples Separator Company, then and there duly excepted, and now assigns the same as error. Thereupon said copy and original was received and read in evidence to the jury as follows:

“Mr. SWING. I will read this to the jury:
 ‘El Centro, California, December 18, 1914, Sharples Separator Company, 420 Mission Street, San Francisco. Have done everything possible. Serious trouble started again. Taking too big risk to continue use of machine. We have discussed every possible phase of situation, to quit milking safest way, or we will have too big a loss according to our agreement. Will await instructions here. Wire at once. Albert J. Reed’.”

XXXII.

Said court erred in overruling defendant’s objection to the testimony set forth in defendant’s bill of exceptions, Exception Number 16, as follows:

“Mr. SWING. Was it started before or after that (358) written paper was signed by Mr. Briggs?

Mr. PARKE. We object to that. There is no evidence of a written contract of any kind.

The COURT. Objection overruled.

Mr. PARKE. Note an exception”.

Said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error. Thereupon the witness testified as follows:

“The WITNESS. After. Briggs was there for one milking, after Reed came, and then a time or two after; Briggs helped Reed to sterilize everything and get it milking. Reed operated it from October until just after Christmas, and while the machine was being operated something like seven or eight cases, I think, of swollen quarters developed. During that time no new cases of swollen quarters developed among the two strings that were being milked by him. As to what cows Briggs and Reed put the milker on when they started on October 20, they selected a string of good cows. I think they were mostly young cows that had not been used on the milking machine before. Some of the cows had had their first calves; I don’t know how many. As to what was the occasion of Reed’s quitting on December 20, why, when he came into the kitchen—he always came into the kitchen where I was—when he came in, he said he wasn’t going to put the milker on another cow; and I wanted to know why, and the words that he used was that he had ruined the last cow for use with a milking machine that he was going to”.

XXXIII.

Said court erred in overruling the objection of said (359) defendant to the following question asked of said plaintiff when recalled as a witness in his own behalf for further redirect examination, as set forth in defendant’s bill of exceptions, Exception Number 17, as follows:

“Q. At the time, Mr. Skinner, you purchased the three units from Mr. Hickson representing the Sharples Separator Company, what, if anything,

was said by him as to the manner or way you could purchase another unit if you so desired?"

Said objection was made upon the grounds that said question was incompetent, irrelevant and immaterial and also sought to develop matters already testified to.

Said objection was overruled by said court, to which ruling of said court said defendant then and there duly excepted and now assigns said ruling as error.

Thereupon the witness testified as follows:

"A. Why, Mr. Hickson was there, with Mr. Edgar's man, and he told me any time I wanted another unit I could either order it through them or notify Mr. Edgar, and they would get the unit for me".

XXXIV.

The court erred in denying defendant's motion, as set forth in defendant's bill of exceptions, Exception Number 18, as follows:

"Thereupon the defendant, Sharples Separator Company, made the following motion:

"We desire to move for a nonsuit, on the ground that it appears from the evidence that the damage, if any, suffered, even under the testimony of the plaintiff, was for the indiscriminate use of the four units, and it further appearing from the evidence that one unit was purchased (360) from Edgar Brothers, and three from the Sharples Separator Company, and no evidence having been introduced, and no basis given upon which the jury or the court could arrive at the damage, if any, which ensued from the three units purchased from the defendant, Sharples Separator Company, or the damage which resulted from the unit purchased by the plaintiff from Edgar Brothers Company. Upon the further ground that the testimony as offered by the

plaintiff is not sufficient to support a verdict in his favor, there being no showing that the milking machine caused any damage to the cows”.

The COURT. I will overrule your motion. Exception granted”.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

XXXV.

Said court erred in sustaining the plaintiff’s objection to defendant’s testimony, as set forth in defendant’s bill of exceptions, Exception Number 19, as follows:

“The WITNESS. I have seen a Sharples’ milking machine, and have seen them in operation. I have examined the udder of cows upon which the Sharples milking machine was being used. The last place I examined was at Westchester, at a dairy that is run at the experimental farm of the Sharples Separator Company. I was in Philadelphia this summer and went down there. I am not in the employ of the Sharples Separator Company. I simply went there to observe it.

“Q. State what you observed in the condition of the udders of those cows. (361)

Mr. SWING. We object to the question on the ground that the evidence as to how other machines worked is not admissible to show compliance with the warranty; and we object to the question on the ground as incompetent, irrelevant and immaterial, how some other machine worked, and on the additional ground that no foundation has been laid.

The COURT. I will sustain the objection as to the cows at Westchester, Pennsylvania.

Mr. PARKE. Note an exception”.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

The following is the substance of the evidence rejected:

“The udders of those cows were in perfectly good condition, and free from disease and injury of any kind”.

XXXVI.

Said court erred in sustaining plaintiff's objection to the defendant's testimony, as set forth in defendant's bill of exceptions, Exception Number 20, as follows:

“Q. State whether or not during the year 1914 milk or any other dairy products from the Imperial Valley were permitted in the city of Los Angeles to be shipped here for consumption in Los Angeles City.

Mr. SWING. Objected to as incompetent, irrelevant and immaterial”.

Said objection was then and there sustained by said court, to which ruling the defendant said Sharples Separator Company, then and there duly excepted, and now assigns said ruling as error.

The following is the substance of the evidence rejected (362): “No, sir”.

XXXVII.

Said court erred in overruling defendant's objection to the following question addressed on cross-examination to the witness Dr. George H. Hart, as set forth in defendant's bill of exceptions, Exception Number 21, as follows:

“Q. Doctor, assuming that the plaintiff in this case, in February, 1914, had a healthy herd of some 90 dairy cows, all of which had been entirely free from garget since the herd had been collected, that plaintiff then bought a Sharples mechanical milker, which was installed by an expert operator, furnished by the defendant company, who after installing the machine, instructed plaintiff, his son and hired man, in the care and operation of the milker and remained with plaintiff until he pronounced the machine properly installed and adjusted and plaintiff and his milkers proficient in the operation of the machine; that thereafter the machine was cared for and operated by the persons who had received instructions as aforesaid, and was cared for and operated in accordance with the instructions furnished by the defendant company; that after the milking machine had been so used on plaintiff's cows for about thirty days, said cows began developing swollen quarters; that the cows showing swollen quarters were promptly taken off of the milker and thereafter milked by hand, following which hand milking the swelling rapidly disappeared and did not reappear in the affected quarters, or in any other quarter of that cow, so long as she was milked by hand, or in the udders of any other cow in the herd, being milked by hand; that the cows (363) which were being milked by hand were subjected to the same conditions of feed, water, quarters, exposure, surroundings, and handling as were the cows being milked by the milker, i. e., all the cows whether milked by the milker or by hand, were subjected at all times to the same identical conditions and surroundings, with the one exception, that one part were being milked by the milker and the other part were being milked by hand, that notwithstanding which the cows which were being milked by the milker continued to develop swollen quarters so long as the milker remained in operation upon them, while those being milked by hand the existing swelling rapidly disappeared and did not reappear so

long as they were milked by hand; that on the 25th day of June, 1914, the defendant, the Sharples Separator Company, sent its expert operator to plaintiff's ranch and he took charge of all the plaintiff's cows and of the milking machine and after thoroughly disinfecting the machine and the premises, began milking all of the plaintiff's cows with the milker, including those cows which had theretofore had swollen quarters; that in a very short time the swellings reappeared in the cows which had theretofore had it, in an aggravated form, which became so intense in the case of about 17 cows, as to stop the passage of milk from the udders; that said expert operator stopped operating the machine about July 7, 1914, and the milker was not again operated until about October 20, 1914; that in said interval all the cows were milked by hand and during that time no new cases of swollen quarters appeared; that on October 20, 1914, the milker was again begun by the same expert operator, who had operated from June 25th to July 7th, and he continued operating it (364) on about 30 cows up until December 20, 1914; that the cows on which said milker was so operated were cows selected by said operator and which had not theretofore shown any udder trouble; that during those two months, between 8 and 12 of the cows being milked by the milker developed swollen quarters, that of the 60 odd remaining cows of the herd being milked during the same period by hand, developed no new cases of swollen quarters; that the cows which were being milked by the milker and the cows that were being milked by hand during said period, were subjected at all times to the same identical conditions and surroundings with the one exception, that the one part were being milked by the milker and the other part were being milked by hand; that said expert operator stopped operating the same machine on December 20, 1914, and the same has not since been operated on any of plaintiff's cows; that plaintiff has never had any such case or any similar case of

swollen quarters in his herd before beginning the use of the milker and there has been no case of swollen quarters in his herd since the milking machine quit, would you say, under those circumstances, that the condition referred to in the question, the udder trouble of Skinner's cows, was caused by bacteria in the first place, or by some injury from the milking machine?"

Said objection was made upon the ground that said question was incompetent, irrelevant and immaterial, and that it assumed conditions not pertinent and not in evidence.

Said objection was overruled by said court and said defendant then and there excepted to said ruling and now assigns said ruling as error.

Thereupon the witness testified as follows (365):

"A. Just what is the question,—whether the trouble was caused by the milking machine, or whether it was caused by bacteria?

Mr. SWING. Yes, sir; in the condition stated by my question.

A. The ultimate trouble was due to bacteria. The primary cause in this case, there being only part of the animals that were milked by the milking machine that were affected—is not that what your question said?

The COURT. That is what he states in his question.

The WITNESS (continuing). That in this case the milking machine could have provided a condition in the udder in this percentage of animals which may have been easy milkers or hard milkers, and as the rules of the company show, should be handled under slightly different conditions, but they may not have been so handled, or they may have been so handled, but nevertheless the milking

machine may have, under those conditions, produced a favorable field for these bacteria to multiply. They may have caused some kind of an injury, or some kind of a reduction of those tissues through the resistances which they ordinarily have. I am familiar with the instructions furnished by the Sharples Separator Company for the operation of their machine. I do not remember that I ever found in there any place where it said to boil the teat cups; it mentions putting them in an antiseptic solution, lime''.

XXXVIII.

Said court erred in sustaining plaintiff's objection to defendant's testimony as set forth in defendant's bill of exceptions, Exception Number 22, as follows:

“The COURT. Now, if you operate this machine as (366) directed in this book, is it a successful machine? A. Yes.

Q. Would it hurt the cow's bag? A. No.

Mr. PARKE. Now, just explain on what you base your answer to the question asked by the court.

A. When the machines were installed in our herd, we had a book of instructions, and we followed it.

The COURT. I don't care anything about your herd. A. Well, those are the instructions.

Mr. PARKE. Well, if the court please, I insist that the witness has a right to give the reasons upon which he bases his answer, whether or not the machine is a success. He says it is a success, and he has a right to give the reasons upon which he bases that opinion.

Mr. SWING. Our objections to the offer as it now stands are that it does not include any offer to show that the conditions under which this machine was operated were similar or identical

with those under which the machine of the plaintiff was operated.

The COURT. Objection sustained.

Mr. PARKE. Note an exception”.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

XXXIX.

Said court erred in sustaining plaintiff’s objection to defendant’s testimony as set forth in defendant’s bill of exceptions, Exception Number 23, as follows:

“Q. State whether or not you got as much milk from a dairy herd of two hundred cows at the Shore Acres dairy as (367) you did from hand milking?

Mr. SWING. We object to that; it is incompetent, irrelevant and immaterial.

The COURT. Objection sustained.

Mr. PARKE. Note an exception”.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

The following is the full substance of the evidence rejected:

“The WITNESS. A. Yes, sir.”

XL.

Said court erred in sustaining the objection of said plaintiff to the offer of said defendant in evidence of the contract signed by Edgar Bros. Company by J. H. Edgar and marked “Defendant’s Exhibit No. 2” herein as set forth in said bill of exceptions, Exception Number 24.

To the ruling of said court sustaining said objection, said defendant then and there duly excepted, and said defendant now assigns said ruling as error.

XLI.

Said court erred in sustaining the objection of said plaintiff to the following question asked upon the direct examination of the witness Albert John Reed, as set forth in defendant's bill of exceptions, Exception Number 25, as follows:

“Q. Were they the same kind of machines that the plaintiff W. W. Skinner was using near El Centro?”

Said objection was based upon the ground that said question was incompetent, irrelevant and immaterial and called for the conclusion of the witness (368).

To the ruling of said court sustaining said objection, said defendant then and there duly excepted, and now assigns said ruling as error.

The following is the full substance of the evidence rejected:

“The WITNESS. A. Yes, sir.

XLII.

Said court erred in overruling defendant's objection to the plaintiff's testimony as set forth in defendant's bill of exceptions, Exception Number 26, as follows:

“Mr. SWING. For whom did you install—for whom were you working when you installed the mechanical milker?

Mr. PARKE. We object to that question on the ground it is not proper cross-examination, and was not called for in the direct examination.

The COURT. Objection overruled.

Mr. PARKE. Note an exception."

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error. Thereupon said witness testified as follows:

"A. I was working for the Sharples Separator Company."

XLIII.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in defendant's bill of exceptions, Exception Number 27, as follows:

"Q. How long have you been working for them approximately?" (369).

Said question was objected to upon the ground that it was not proper cross-examination, and was not called for in the direct examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

"A. I started to work for them on the first of June, 1913, and continued to work for them until January 15, 1915."

XLIV.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination as set forth in defendant's bill of exceptions, Exception Number 28, as follows:

“Q. About how many dairies are you acquainted with down there?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. I am acquainted with some half a dozen down there.”

XLV.

Said court erred in overruling the objection of said defendant to the question addressed to said witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 29, as follows (370):

“Q. Did you ever warn Skinner not to use water out of this water hole?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now

assigns said ruling as error. Thereupon the witness testified as follows:

“A. When I went down in June and July I did.”

XLVI.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 30, as follows:

“Q. What was done?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Boiled water was used then; he followed my suggestion.”

XLVII.

Said court erred in overruling said defendant's objection to the following question addressed to said witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 31, as follows (371):

“Q. How many times were you there, at Skinner's place?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Well, I have been there a dozen times, off and on. I was there first in the first part of February, and remained for twelve or fourteen days. The occasion of my being there at the time was to install a mechanical milker. I was next there in the latter part of March, or the first of April.”

XLVIII.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 32, as follows:

“Q. About how long were you there at that time?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Two or three milkings.”

XLIX.

Said court erred in overruling the objection of said defendant to the following question addressed to the (372) witness Albert J. Reed, on cross-examination, as

set forth in defendant's bill of exceptions, Exception Number 33, as follows:

“Q. What was the occasion of your being there that time?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Trouble.”

L.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 34, as follows:

“Q. What was the trouble?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Skinner's trouble with his cows.”

LI.

Said court erred in overruling the objection of said defendant to the following question addressed to the

witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 35, as (373) follows:

“Q. What was the occasion of your being called in?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows

“A. I was the expert in charge.”

LII.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 36, as follows:

“Q. An expert in charge for whom?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Sharples Separator Company.”

LIII.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 37, as follows:

“Q. How long were you there at that time?”
(374).

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. I was there a couple of days, anyhow.”

LIV.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 38, as follows:

“Q. And when were you next there, if you remember?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now

assigns said ruling as error. Thereupon the witness testified as follows:

“A. June 25th to July 7th.”

LV.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 39, as follows:

“Q. What was the occasion of your being there that time?”

Said objection was based upon the ground that said question was not proper cross-examination (375).

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Skinner stopped his machine and I was sent for to restart it.”

LVI.

Said court erred in receiving in evidence and in refusing to strike out the following answer given by said witness Albert J. Reed to the question:

“Q. What was the occasion of your being there at that time?”, addressed to said witness on cross-examination, as set forth in said defendant's bill of exceptions, Exceptions Numbers 39 and 40, as follows:

“A. Skinner stopped his machine and I was sent for to restart it.”

Said motion to strike out was then and there denied by said court, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

LVII.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 41, as follows:

“Q. You say you were sent to Skinner's place—by whom were you sent?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling (376) said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. The Sharples Separator Company.”

LVIII.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 42, as follows:

“Q. When next were you there?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. October 20th to December 20th.”

LIX.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 43, as follows:

“Q. What was the occasion of your being there at that time?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns (377) said ruling as error. Thereupon the witness testified as follows:

“A. To take charge of the mechanical milker. I was working at that time for the Sharples Separator Company. While there on the Skinner ranch at that time I operated the milker.”

LX.

Said court erred in receiving in evidence, over the objection of said defendant that the same was not proper cross-examination, the following portion of the testimony of said witness Albert J. Reed as given on cross-

examination, as set forth in said defendant's bill of exceptions, Exception Number 44, as follows:

“A. To take charge of the mechanical milker. I was working at that time for the Sharples Separator Company. While there on the Skinner ranch at that time, I operated the milker.”

Said court overruled said objection of said defendant, to which ruling said defendant then and there duly excepted, and now assigns the same as error.

LXI.

Said court erred in receiving in evidence, over the objection of said defendant that the same was not proper cross-examination, the following portion of the testimony of said witness Albert J. Reed as given on cross-examination as set forth in said defendant's bill of exceptions, Exception Number 45, as follows:

“The WITNESS (continuing). Cows were milked by hand when I went there on my second visit; there were two or three that had swollen quarters, that were being milked by hand. On my third visit, some half-dozen cows, perhaps, (378) were being milked by hand. When I got there in June they were all being milked by hand. They had quit using the milker and I started it again.”

Said court overruled said objection of said defendant, to which ruling said defendant then and there duly excepted, and now assigns the same as error.

LXII.

Said court erred in overruling the objection of said defendant to the following question addressed to the

witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 46, as follows:

“Q. After that, were any of the cows taken off for any reason and milked by hand?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Some dozen or so were taken off and milked by hand, and six or eight were isolated. I was in charge at that time, and this was done under my instruction”.

LXIII.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 47, as follows:

“Q. For what reason?” (379).

Said objection was based upon the grounds, that it is not proper cross-examination, and is asking for the opinion and conjecture of the witness, and not for a statement of fact.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now

assigns said ruling as error. Thereupon the witness testified as follows:

“A. The condition of the cows warranted it”.

LXIV.

Said court erred in receiving in evidence and in refusing to strike out the answer of the witness Albert J. Reed to the question, “Q. For what reason” addressed to said witness on cross-examination as set forth in said defendant’s bill of exceptions, Exception Numbered 47 and 48, as follows:

“A. The condition of the cows warranted it”.

Said motion to strike out was made upon the ground that said answer of said witness to said question was not responsive.

Said court denied said motion, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

LXV.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant’s bill of exceptions, Exception Number 49, as follows:

“Q. What was the condition of the cows?” (380).

Said objection was based upon the grounds that said question was incompetent, irrelevant and immaterial, not proper cross-examination, and asking for the opinion

and conjecture of the witness, and not a statement of fact.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. The whole udder was swollen, there was high fever and individual cows were in very bad condition.”

LXVI.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed, on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 50, as follows:

“Q. How soon did this condition appear after you had started the milker upon them?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Directly.”

LXVII.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination as set forth

in said (381) defendant's bill of exceptions, Exception Number 51, as follows:

“Q. After you started the milker on that string of 30, were any taken off and milked by hand?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Some two or three during the first two weeks, and then one or two as warranted, later on.”

LXVIII.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 52, as follows:

“Q. Why was the milker taken off these cows?”

Said objection was based upon the grounds that said question was not proper cross-examination, not having been brought out in a direct examination, and calling for the conjecture of the witness, and not for a statement of facts.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now

assigns said ruling as error. Thereupon the witness testified as follows:

“A. Owing to swollen quarters.”

LXIX.

Said court erred in overruling the objection of (382) said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 53, as follows:

“Q. I will ask you if Skinner was getting as much milk in quantity in December when you quit, as he was in February, when the milking machine was started on these cows, from those on which the milking machine had been used?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. In my opinion he was not.”

LXX.

Said court erred in receiving in evidence and in refusing to strike out the answer of said witness Albert J. Reed to the question: “I will ask you if Skinner was getting as much milk in quantity in December, when you quit, as he was in February, when the milking machine was started on these cows, from those on which the milking machine had been used”,

addressed to said witness on cross-examination, as set forth in said defendant's bill of exceptions, Exceptions Numbered 53 and 54, as follows:

“A. In my opinion, he was not.”

Said motion to strike out was based upon the ground that said answer was not responsive, and was not based upon a statement of facts.

Said court denied said motion, to which ruling said (383) defendant then and there duly excepted, and now assigns said ruling as error.

LXXI.

Said court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 55, as follows:

“Q. And some quit giving milk in one quarter, and some in more quarters?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Yes.”

LXXII.

Said court erred in granting the motion of said plaintiff to strike out from the cross-examination of

the witness Frederick A. Frank, the following language as set forth in said defendant's bill of exceptions, Exception Number 56, as follows:

“And I believe that Reed notified Skinner of this fact, too.”

To said ruling of said court striking out said passage from said cross-examination of said witness, said defendant then and there duly excepted, and now assigns said ruling as error (384).

LXXIII.

Said court erred in receiving in evidence, and in refusing to strike out from the direct examination of the witness, C. F. Boarts, as set forth in said defendant's bill of exceptions, Exception Number 57, the following language:

“He had a very good dairy house.”

Said motion was made upon the ground that said answer of said witness was a conclusion of the witness.

Said court denied said motion, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

LXXIV.

Said court erred in sustaining plaintiff's objection to H. D. Nye's testimony, as set forth in defendant's bill of exceptions, Exception Number 58 as follows:

“Q. Is it not a fact, Mr. Nye, that dairy conditions in the Imperial Valley during the year 1914, or during the time when you were State dairy

inspector down there, were such that milk and dairy products were not permitted to be shipped from Imperial Valley into Los Angeles city for consumption?

Mr. SWING. Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination.

The COURT. Objection sustained.

Mr. PARKE. Note an exception."

The said defendant, said Sharples Separator Company, a corporation, assigns said ruling as error. The following is the substance of the evidence rejected:

"The WITNESS. Yes, sir." (385)

LXXV.

Said court erred in receiving in evidence and in refusing to strike out from the cross-examination of Dr. V. E. Cram, as set forth in said defendant's bill of exceptions, Exception Number 59, the following passage:

"I found pus in the teats of the cows; that indicates the presence of a germ. There are not two or three kinds of germs—noninfectious and infectious germs. The presence of pus indicates the presence of a germ; this germ was not an infectious germ; it is not a contagious germ. I did not make any bacteriological test of the germs from Skinner's cows. As to whether they were not staphylococci, streptococci or micrococci, which by the better authorities are held to be infectious. I presumed it was staphylococcus; I presumed it was; my opinion is a presumption, and I made no bacteriological or chemical analysis."

Said motion was based upon the ground that the answers of said witness as to causes were incompetent, as they appear as mere presumptions on his part.

Said court denied said motion, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

LXXVI.

The court erred in overruling defendant's objection to plaintiff's testimony as set forth in defendant's bill of exceptions, Exception Number 60, as follows:

"Q. Doctor, assuming that a herd of dairy cows were being milked, one string by a Sharples mechanical milker, and another string by hand, and that the only cases of swollen quarters to appear in the herd appeared among the cows milked (386) by the mechanical milker, and that when the condition so appeared the affected cows were taken off the milker and milked together with other cows, then being milked by hand, not being isolated, and that the milkers did not wash their hands between cows, that the cows milked by hand got well, and the swollen quarters did not spread to a single other cow being milked by hand. What would you say as to what was the cause of the swollen quarters?"

Mr. PARKE. We object to the question as assuming only a partial statement by the uncontradicted facts as presented by the evidence, it appearing clearly from the evidence that there was present in the milk from Skinner's cows certain germs designated as staphylococci, and it would be unfair to ask the witness the cause of such condition, without setting forth that condition. And, further, nothing is said about the manner in which the milking machine was operated.

The COURT. Well, I overrule the objection.

Mr. PARKE. Note an exception."

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error. Thereupon the witness testified as follows:

“A. I would believe the teats there were being bruised by the milker. I would not say, under the conditions stated in the question, that the swollen quarter was an infectious condition. I think that the cup on this teat has bruised the quarter. The reason I think so was because there was no spreading of the disease there originally, and as soon as they took the teat cup off and went to milking these cows by hand, why, the trouble disappeared. The primary cause (387) in my opinion, of the condition stated was the bruising of the teat cup—or the teat by the teat cup”.

LXXVII.

Said court erred in overruling the objection of said defendant to the following question addressed on direct examination to the witness A. G. McCulloch, as set forth in said defendant's bill of exceptions, Exception Number 61, as follows:

“Q. What are some of the causes of mammitis, if you can say?”

Said objection was based upon the ground that said question called for an expert opinion of the witness, no foundation having been laid therefor.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Any injury inflicted upon the cow's udder will cause an inflammation. I know the general

difference between infectious mammitis and non-infectious mammitis.”

LXXVIII

Said court erred in overruling the objection of said defendant to the following question addressed to said witness A. G. McCulloch, on direct examination, as set forth in said defendant’s bill of exceptions, Exception Number 62, as follows:

“Q. I will ask you whether, in your opinion, non-infectious mammitis can be caused by the use of a Sharples Mechanical Milker in milking cows.”

Said question was objected to as calling for a conclusion, (388) no proper foundation having been laid, and as incompetent, irrelevant and immaterial, and because the circumstances and conditions under which the operation of the machine might be made were not stated in the question.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. It can.”

LXXIX.

Said court erred in overruling the objection of said defendant to the following question addressed on direct examination to said witness A. G. McCulloch, as set forth in said defendant’s bill of exceptions, Exception Number 63, as follows:

“Q. Did you follow them in operating the milker?”

Said objection was based upon the ground that said question called for a conclusion of the witness.

Said court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. I did.”

LXXX.

Said court erred in overruling defendant's objection to plaintiff's testimony, as set forth in defendant's bill of exceptions, Exception Number 64, as follows:

“Q. I will ask you whether, in your opinion, the Sharples mechanical milker can be operated upon dairy cows in the Imperial Valley without seriously injuring some of (389) them?

Mr. PARKE. We object to the question as calling for an expert opinion of the witness, no foundation having been laid, incompetent, irrelevant and immaterial, and presuming a state of facts not proven in this case at issue.

The COURT. The objection is overruled.

Mr. PARKE. We note an exception.”

And said defendant, said Sharples Separator Company, now assigns said ruling as error. Thereupon the said witness testified as follows:

“A. No, it cannot.”

LXXXI.

Said court erred in overruling defendant's objection to plaintiff's testimony, as set forth in defendant's bill of exceptions, Exception Number 65, as follows:

“Q. What, in your opinion, would be the effect upon a string of dairy cows, if milked any considerable length of time with a Sharples mechanical milker, even though all the instructions furnished by the company were strictly followed?

Mr. PARKE. We object to the question as calling for an expert opinion of the witness, presuming a state of facts not proven in this case, and incompetent, irrelevant and immaterial.

The COURT. The objection is overruled.

Mr. PARKE. We note an exception.”

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error. Thereupon said witness testified as follows:

“A. It would eventually kill the cows if persisted in. (390) It would develop an inflammation, and the inflammation would only be increased and aggravated by the use of the machine, if persisted in.”

LXXXII.

Said court erred in refusing to give to the jury the Instruction No. 11 as requested by the defendant and as set forth in defendant's bill of exceptions, Exception Number 66, as follows:

“If you believe from all the evidence that the plaintiff's cows were injured by the use of the milking machine furnished by the defendant, Sharples Separator Company while being operated in strict accordance with the instructions given to the plaintiff by the defendant, then you are instructed that the full measure of plaintiff's damage is the difference between the value of the cows before they were injured, and the value immediately after such injury resulted, and if such damage be allowed plaintiff is not entitled to recover anything

additional for care or keep of said cows, or for loss of butter fat therefrom.”

Which said Instruction No. II said court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said court misdirected said jury; and to said ruling of said court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error (391).

LXXXIII.

Said court erred in refusing to give to the jury Instruction No. III as requested by defendant and as set forth in defendant’s bill of exceptions, Exception Number 67, as follows:

“You are instructed that the plaintiff is not entitled to any claim for damages for loss of butter fat.”

Which said Instruction No. III, said court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said court misdirected said jury; and to said ruling of said court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

LXXXIV.

Said court erred in refusing to give to the jury Instruction No. IV as requested by defendant and as set

forth in defendant's bill of exceptions, Exception No. 68, as follows:

“There is no evidence before the court as to the value of the pasturage claimed by plaintiff, and plaintiff cannot recover therefor.”

Which said Instruction No. IV said court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said court misdirected said jury; and to said ruling of said court, refusing to give said instruction to said jury, the said defendant, in the (392) presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

LXXXV.

Said court erred in refusing to give to the jury Instruction No. VII as requested by defendant and as set forth in defendant's bill of exceptions, Exception No. 69, as follows:

“If, from all the evidence, you believe that the plaintiff's cows had infectious mammitis, or any other infectious disease of the udder, and that such disease contributed to, or caused any part, or all, of the injury to the cows claimed to have been injured, then you are instructed that the defendant, Sharples Separator Company, cannot be held liable in damages to the plaintiff for such injury resulting from such diseased condition.”

Which said Instruction No. VII, said court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said court misdirected said instruction to said jury, the said defendant, in the

presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

LXXXVI.

Said court erred in refusing to give to the jury Instruction No. IX as requested by defendant and as set forth in defendant's bill of exceptions, Exception No. 70, as follows (393):

“If you believe, from all the evidence, that plaintiff's cows had infectious mammitis, or other disease of the udder, and that with knowledge of the diseased condition the plaintiff used, or permitted the milking machine purchased from defendant Sharples Separator Company to be used upon the cows so diseased, you are instructed that the defendant Sharples Separator Company is not liable for the injury resulting from the use of the machine upon cows so diseased.”

Which said Instruction No. IX, said court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said court misdirected said jury; and to said ruling of said court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

LXXXVII.

Said court erred in refusing to give to the jury Instruction No. XI, as requested by defendant and as

set forth in defendant's bill of exceptions, Exception Number 71, as follows:

"If you believe, from all the evidence, that the diseased condition of plaintiff's cows which resulted in the injury complained of by him, was a traumatic, noninfectious disease of the udder, known as ordinary garget, and that the permanent injury (394) to plaintiff's cows as claimed by him resulted from a lack of proper care and treatment of said cows by the plaintiff, then you are instructed that the defendant Sharples Separator Company cannot be held responsible for any injury or damage which might have been prevented by the proper treatment of the injured cows by the plaintiff."

Which said Instruction No. XI, said court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said court misdirected said jury; and in said ruling of said court, refusing to give said instructions to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

LXXXVIII.

Said court erred in refusing to give to the jury Instruction No. XII as requested by defendant and as set forth in defendant's bill of exceptions, Exception Number 72, as follows:

"You are instructed that your verdict in this case should be in favor of the defendant Sharples Separator Company."

Which said Instruction No. XII, said court then and there refused to give to said jury, and in failing so

to instruct and charge said jury, said court misdirected said jury; and to said ruling of said court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its (395) verdict, then and there duly excepted and now assigns said ruling as error.

LXXXIX.

Said court erred in refusing to give to the jury Instruction No. XIV as requested by defendant and as set forth in defendant's bill of exceptions, Exception Number 73, as follows:

“If you believe, from all the evidence, that any part or all of the damage to plaintiff's cows, from whatever cause, resulted from a lack of prompt, proper and careful treatment of said cows by the plaintiff, then you are instructed that for all such resulting damage the defendant, Sharples Separator Company, is not liable.”

Which said Instruction No. XIV said court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said court misdirected said jury; and to said ruling of said court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

XC.

Said court erred in refusing to give to the jury Instruction No. XV, as requested by defendant and as

set forth in defendant's bill of exceptions, Exception Number 74, as follows:

“If you believe, from all the evidence, that the death of the three cows, and the (396) diseased condition of the udders of the other twenty-four cows, resulted from the invasion into the udders of these cows of an infectious disease, then the defendant in this case is not liable to the plaintiff for such damage.”

Which said Instruction No. XV, said court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said court misdirected said jury; and to said ruling of said court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

XCI.

Said court erred in refusing to give to the jury Instruction No. XVI, as requested by defendant and as set forth in defendant's bill of exceptions, Exception Number 75, as follows:

“If you believe, from all the evidence, that the diseased condition of plaintiff's cows resulted from the negligent or improper use by him of the milking machine purchased from the defendant, then you are instructed that the defendant Sharples Separator Company is not liable for such damage.”

Which said Instruction No. XVI, said court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said court misdirected

(397) said jury; and to said ruling of said court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and assigns said ruling as error.

XCII.

Said court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 76, as follows:

“This is an action brought by plaintiff to recover damages for injuries and losses suffered by him as a result of the operation of a Sharples mechanical milker upon his herd of dairy cows. Plaintiff alleges that defendant sold him a Sharples mechanical milker and warranted the same to be fit and proper for milking plaintiff's dairy cows and represented that if the same was operated according to its instructions it would not injure his cows or decrease the amount of milk received from them. Plaintiff further alleges that said mechanical milker was operated according to the instruction furnished by the Sharples Separator Company, but that it both seriously injured his cows and decreased the amount of milk given by them. These allegations are denied by the defendants and it is for you to decide whether or not they are true. If you find from this evidence that they are true, it is your duty to return a verdict for the plaintiff for such damages as it is shown plaintiff has sustained, as alleged in (398) the complaint, and under the rule of damages which I give you for assessing damages; and I might say here to you, gentlemen, that while Edgar Brothers was sued in this complaint they are no more a party to this action, because as to them the action was dismissed.”

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said court.

XCIH.

The court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 77, as follows:

"The evidence in this case shows that plaintiff operated the milker which he purchased from defendant or permitted the same to be operated on all or some of his cows from about February 7, 1914, to July 7, 1914, and again from October 20, 1914, to December 20, 1914. Plaintiff claims that within about a month after the milker was started his cows began suffering from the effects of its operation and that his cows were injured as long as the milker was operated.

"If you find from the evidence that the plaintiff's cows were so injured by the operation of said milker you are to allow his damages in the sum which would be a fair compensation for the loss incurred by an effort in good faith to use the (399) machine for milking plaintiff's cows. In considering plaintiff's good faith in continuing the use of the milker and permitting it to be started again after it had once been stopped, you are to consider all the circumstances surrounding the operation of the milker, including the representations made by the defendant company and its employees.

"The word 'fair' used in this instruction to describe the compensation to which plaintiff may be entitled is not used by me to mean something less than 'full' or 'complete' compensation; it is used rather in the sense of 'just'."

And the defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said court.

XCIV.

Said court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 78, as follows:

“The jury are instructed at the time the Sharples Separator Company sold the mechanical milker to plaintiff, the said Sharples Separator Company guaranteed the machine to be in all respects as represented in its printed matter and to be capable of doing the work claimed therein. Plaintiff has offered in evidence a number of printed documents which he says were delivered to him by the Sharples Separator Company during the (400) negotiations leading up to the sale to him of the Sharples mechanical milker. These contained various statements regarding the Sharples mechanical milker, and what it will do, and it is for you to decide from all the evidence whether the warranty has been performed.”

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said court.

XCV.

Said court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 79, as follows:

“You are instructed that the only warranty given to the plaintiff by the defendant Sharples Separator Company which is to be considered by you is the warranty contained in the original order, being plaintiff’s Exhibit 1, introduced in evidence; and you can take that with you to the jury-room, gentlemen, or any other exhibit you desire.

“You are instructed that, under the law of California, a detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that (401) time.

“Also that the detriment caused by the breach of warranty of the fitness of an article of personal property for a particular purpose is deemed to be that which I have just specified, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose.”

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said court.

XCVI.

Said court erred in giving the following instruction to the jury as set forth in defendant’s bill of exceptions, Exception Number 80, as follows:

“The jury are instructed that if you find from the evidence that there was a warranty that the Sharples mechanical milker sold plaintiff would milk his cows without injury and you also find that the warranty was broken, you should allow plaintiff damages for all injuries which are the approximate result of the operation of said milker upon said

cows while the machine was being operated by plaintiff or his help in conformity with instructions furnished by the defendant company, and also damages for all injury done by the milker while being operated by the employee or agent of the defendant company, if you find any time it was so operated by an employee or agent of the (402) defendant company.”

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said court.

XCVII.

Said court erred in giving the following instruction to the jury as set forth in defendant’s bill of exceptions, Exception Number 81, as follows:

“If you believe from all the evidence that plaintiff’s cows were injured by the use of the milking machine furnished by the defendant, while being operated in strict accordance with the instructions given to the plaintiff by the defendant, or while being operated by the defendant, upon the plaintiff’s cows, then the plaintiff is entitled to recover such damages as are shown by the evidence to have been the proximate result of injuries caused by said machine.”

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said court.

XCVIII.

Said court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 82, as follows:

"In estimating the value of the cows (403) that were injured the true measure of such damage is the value of said cows before they were injured and the value after such injury resulted. And in speaking of value, gentlemen, I am speaking of the market value of the cows."

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instructions and now assigns as error the giving of said instruction to said jury by said court.

XCIX.

Said court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 83, as follows:

"You must not allow a duplication of damages. That is to say, you must not allow for the value of the cow and also for the value of the butter fat that she might have given after his loss, and I give you these rules to govern you in allowing the damages:

"1st: Where a cow died, you shall allow for the use of the cow, that is to say, for the loss of the butter fat which the plaintiff sustained by reason of the injury to the cow until the time of her death; then allow for the value of the cow if she had not been injured.

"2d: Where a cow was permanently injured and destroyed as a milk cow, you shall allow for the loss of the butter fat from the time she was injured

for a reasonable length of time to determine that the cow would be of no (404) further use as a milk cow and until she was well enough to be disposed of for beef; than allow the difference between the value of the cow before she was injured and the value of the cow for beef.

“3rd: Where a cow was not destroyed as a milk cow, but permanently injured, you shall allow for loss of butter fat during the time she was injured so that she gave a less quantity of milk, then consider the amount of damage that was done to the cow, that is to say, the value of the cow before her injury, and the value of the cow as a milk cow after her injury.

“4th: Where a cow was not permanently injured, but was only injured for a time, you shall allow for loss of butter fat during the time she was injured and did not give her normal amount of milk.

“5th: If the machine did not produce as much milk when being used as if said cows had been milked by hand, and there was in consequence a loss of butter fat, you can take that into consideration and allow for such loss of butter fat.

“In determining the loss of the use of the cow that is shown by the loss of butter fat, you should take into consideration the expense of keeping the cow, and not allow expense of pasturage and also loss of use of cows.”

Said defendant, in the presence of said jury and before it retired to consider its verdict, then and there (405) duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said court.

C.

Said court erred in permitting to be rendered and in receiving the verdict of the jury in the above entitled

action; and to said verdict, and to the action of said court in permitting to be rendered and in receiving said verdict, said defendant then and there, upon the announcement of said verdict duly excepted, and now assigns said verdict and the action of said court thereon as error.

CI.

Said court erred in giving, making, rendering, entering and filing its judgment in the above entitled action in favor of the above named plaintiff and against the above named defendant.

CII.

Said court erred in not giving, making, rendering, entering and filing its final judgment in the above entitled action in favor of the above named defendant and against the above named plaintiff.

CIII.

Said court erred in giving, making, rendering, entering and filing its final judgment in the above entitled action in favor of said plaintiff and against said defendant upon the pleadings and record in said action.

CIV.

Said court erred in giving, making, rendering, entering, and filing its final judgment in said action in favor of said plaintiff and against said defendant, in this, that said final judgment was and is contrary to law and to the (406) cause made and facts stated in the pleadings and record in said action.

THE BILL OF EXCEPTIONS.

By procuring the stipulation of December 29, 1916, and the order of court sanctioning it, and by approving the bill of exceptions and agreeing that it should become part of the record in the cause, defendant in error is estopped to attack the regularity of the bill: he cannot now take advantage, to the detriment of plaintiff in error, of a situation originated by himself for his own benefit; and it would be inequitable to permit him to assume a position inconsistent with said stipulation and order, to the prejudice of this plaintiff in error.

Upon the settlement of the bill of exceptions in the lower court, it was objected to the bill that it had not been presented to the learned judge below for settlement and signing, nor was the same settled and signed, within the time allowed by law or within the term of the court at which the trial was had and judgment rendered and entered; and since this objection will doubtless be renewed here, we desire to state the reasons, which, in our judgment, would seem to call for its disallowance.

The relevant facts are that the verdict was rendered and the judgment entered on October 13, 1916 (94-97). By an appropriate stipulation, entered into between the plaintiff and defendant below, and an order entered thereon, the time within which this plaintiff in error might prepare, serve and file its bill of exceptions was duly extended to December 5, 1916; and thereafter by similar stipulations, said time was further extended to December 23, 1916, on which

last mentioned day “the proposed bill of exceptions “ was duly served and filed” (353). The defendant below having thus accomplished all that was then required of it, it became the duty of the plaintiff below to prepare and present his proposed amendments to the proposed bill; and, with this object in view, and “*at plaintiff’s request*” (353), a stipulation was entered into extending plaintiff’s time to prepare, serve and file his proposed amendments, until Wednesday, January 31, 1917. This stipulation was dated December 29, 1916, and an order of court in accordance therewith was made and entered. The new term of court began on the second Monday of January, 1917, that is to say, on January 8, 1917; and therefore the effect of the stipulation, entered into “at plaintiff’s request”, and for his convenience, was that the bill of exceptions, although prepared, served and filed within the term at which the judgment was rendered and entered, could not, without a violation of the stipulation and order of court, be settled until the expiration of the time which the plaintiff had asked for and received. Thereafter, on December 26, 1916, counsel for plaintiff being present but not consenting, defendant’s counsel obtained from the learned judge below an order granting five days after the coming in of the proposed amendments within which to present the bill and amendments for settlement,—an order which, in the event of dissent from the proposed amendments is quite justified by Rule 25 of the Rules of Practice of the court below, which provides *inter alia* that:

“If amendments are served and filed within the time allowed, they shall be deemed assented to by the party proposing the bill, and may, in like time and manner, be presented to the judge for allowance, unless the said party, within three days after receiving a copy of such amendments, shall notify the opposing attorney of his dissent, and that at a time and place specified, not less than two nor more than five days distant, he will present the proposed bill and amendments to the judge for settlement, and in that case the bill shall be so presented.”

On January 31, 1917, at the expiration of the time sought for by plaintiff and obtained by him from defendant and sanctioned by order of court, the proposed amendments were served and filed. On February 3, 1917, in compliance with the aforesaid Rule 25, the defendant dissented from the proposed amendments, and gave notice to the plaintiff that on February 6, 1917,—a date “not less than two nor more “than five days’ distant” (Rule 25),—it would present the proposed bill and amendments for settlement. Accordingly, on February 6, 1917, the bill and amendments were presented for settlement; but although the defendant had throughout done all things required of it, and although the delay ensued at the request of plaintiff and for his convenience and accommodation, yet the objection was actually made that the bill was neither presented nor signed within the term. When the bill and amendments were presented on February 6, 1917, it appeared that certain corrections were necessary, and thereupon the learned judge below, plaintiff objecting, made his order granting additional time until February 10, 1917, to remedy the bill: but this time

turned out to be unnecessary, because, on February 8, 1917, the bill was stipulated to be correct, and on February 9, 1917, was signed by the learned judge and filed. The whole story is told between pages 353-357 of the record.

It must be obvious, we think, that, in the lower court, this plaintiff in error did everything in its power to comply with all relevant requirements, and completed and filed its bill of exceptions within due time for that purpose—within the term in which the judgment was rendered and entered; and upon the other hand, we think it equally clear that the act which carried the settlement of this bill over into the ensuing January term was the stipulation which originated with the plaintiff below, which was requested by him, which was signed for his convenience and accommodation and which was sanctioned by order of court. Can this defendant in error now be permitted to take advantage of a delay originated by himself? Is this plaintiff in error to be prejudiced by the inaction and failure of the defendant in error to propose his amendments within the term? Is a party litigant, who has in all respects complied with the law, and who is itself in no default and guiltless of laches, to suffer by the act of its opponent in procuring the term to pass without settling a bill proposed in due time? Is an extension of time beyond the term, sought for and obtained by defendant in error for his own convenience and accommodation, to be visited as a sin upon the head of this unoffending plaintiff in error? Is it in the power of one litigant to request, for his own benefit, an extension

of time beyond the term, and then, having taken full advantage thereof, seek to utilize that very extension to beat down the rights of his opponent? How can it be just that one should request and receive an extension of time, and then, when the extension has carried the further proceedings beyond the term at which the judgment was entered, take advantage of a delay caused by himself, and be heard to claim that the bill is bad because not settled within the term which his own requested extension overleaped? One's sense of natural justice instinctively rebels against such a doctrine, and we venture the assertion that no authoritative decision supporting it upon a similar state of facts can be produced. All over this country, the rule is settled that a valid stipulation concerning any matter properly before the court acts as an estoppel upon the parties thereto and is conclusive of all matters necessarily included in the stipulation (*Brooklyn Mg. Co. v. Miller*, 227 U. S. 194: *Grant v. Bank*, 232 Fed. 201: *Fortney v. Carter*, 203 id. 454; *Hotchkiss v. Bank*, 200 id. 299: *Meagher v. Galiardo*, 35 Cal. 602, 605-6: *Cooper v. Gordon*, 125 id. 296, 301-2: *Roth v. Superior Court*, 147 id. 604: *Haese v. Heitzeg*, 159 id. 569: *McCann v. McCann*, 20 Cal. App. 564; and see the authorities collected in 36 *Cyc.* 1292, n. 69, and in the annotations thereto issued for 1901-1913, and for 1914-1917). As observed in *Fortney v. Carter*, *supra*, "fairness" requires that a stipulation be not moved aside: as pointed out in *Grant v. Bank*, *supra*,

"This stipulation cannot be disregarded or varied. It was the solemn deliberate act of the parties. It was

the authority for all that was done; the court having sanctioned that disposition of the case" (207);

and in the cause at bar, as already pointed out, the stipulation was "sanctioned" by the order of the court below (354). And as observed in *Mcagher v. Gagliardo*, supra,

"agreements between parties of the character of which this case discloses, are not only agreements between the parties, but between them and the court, which the latter is bound to enforce, not only for the benefit of the party interested in their performance, but for the protection of its own honor and dignity".

Cf. *Smith v. Whittier*, 95 Cal. 279, 288.

It may be added that one who has with knowledge of the facts assumed a particular position in judicial proceedings, is estopped to assume a position inconsistent therewith to the prejudice of the adverse party; under the operation of this rule parties to stipulations and agreements entered into in the course of judicial proceedings are estopped to take positions inconsistent therewith to the prejudice, injury or disadvantage of the party setting up the estoppel; and this doctrine is supported by an immense mass of authority, some of which may be cited (*Speake v. U. S.*, 13 U. S. (9 Cranch) 28: *Ohio Ry. v. McCarthy*, 96 U. S. 258: *Halliday v. Stuart*, 151 U. S. 229: *Robb v. Vos.*, 155 id. 13; *Davis v. Wakelee*, 156 id. 680: *Bank v. Brady*, 184 U. S. 665: *Valdez v. Central Altagracia*, 225 U. S. 58: Cf. *Wells v. Neiman-Marcus Co.*, 227 U. S. 469: *Schmidt v. Bank*, 234 id. 64: *Jones v. The St. Nicholas*, 49 id. 671: *Sullivan v. Colby*, 71 id. 460: *Houston*

Bank v. Ewing, 103 id. 168: *Mootry v. Grayson*, 104 Fed. 613: *The Triton*, 129 id. 698, 700; *Wilson v. Ry.* 129 Fed. 774; *Lumber Co. v. Blanks*, 133 id. 479: *Kansas etc. Ins. Co. v. Burman*, 141 Fed. 835, 842: *Shackleton v. Bag-galey*, 170 id. 57: *McNeil v. McNeil*, 170 id. 289: *Gering v. Leyda*, 186 id. 110: *Faenzer v. Ry.*, 191 id. 543: *Boynton Co.*, 211 id. 812: *Packing Co. v. Beshlin*, 211 Fed. 922: *Commercial Co. v. U. S.*, 217 id. 33: *Bravis v. Ry.*, 217 id. 234: *Sash etc. Co. v. Stitt*, 218 id. 1: *Mull v. Parrott*, 218 id. 713: *Nelson v. Hecksher*, 219 id. 679: *Oil Co. v. Shelton*, 220 id. 247: *Pindle v. Holgate*, 221 id. 342: *Boggs v. Bright*, 222 id. 714: *Lansingburgh v. McCormick*, 224 id. 874).

The principles just suggested are, it is submitted, controlling in the instant predicament, as may be illustrated by *Davis v. Patrick*. In that case, the delay in setting the bill of exceptions was caused by a stipulation of the parties which, like the stipulation here, presupposed the passage of the particular term during which the judgment was rendered and entered; and the manner in which the Supreme Court treated the situation is disclosed in the following excerpt:

“The plaintiff moves to strike the bill of exceptions from the record, for the reason that it was not allowed and signed in proper time. On the day the judgment was entered, June 25, 1883, a written stipulation between the parties was filed, providing that the defendant should have forty days to prepare and present to the court his bill of exceptions, and that the plaintiff should have twenty days thereafter to examine the same and make any suggestions of omission, addition or correction thereto. On the 16th of August, 1883, the writ of error was allowed and filed, a supersedeas bond, duly

approved, was filed, and a citation was duly issued, the writ of error being returnable at October Term, 1883. On the 14th of September, 1883, the following written stipulation, entitled in the cause, was made between the parties: 'The bill of exceptions in this case having been partially settled by His Honor, Judge Dundy, and he desiring to be absent from the district for a month or more, and being unable to settle the remainder of the bill before leaving, it is hereby stipulated that the same may be settled and signed at any time before November 1, 1883, and that the record may be filed in the supreme court by the first of December, 1883, with the same effect as if filed at the beginning of the October Term'. The term of the court at which the trial was had and the judgment rendered adjourned *sine die* on the 20th of October, 1883. The succeeding term of the court began on the 12th of November, 1883. The bill of exceptions was allowed and signed by the judge on the 8th of December, 1883, and was filed on the same day. The record was filed in this court on the 26th of December, 1883.

The point taken is that, as the bill of exceptions was signed after the beginning of the term of this court at which the writ of error was made returnable, and during a term of the circuit court succeeding that at which the case was tried, it cannot be considered. But we are of opinion that this objection cannot avail. The stipulation of September 14, 1883, shows on its face that the matter of the settlement of the bill of exceptions had been submitted to the judge, and that the delay was agreed to for the convenience of the judge. The purpose of the stipulation is that the bill had, with the knowledge of the plaintiff, been tendered to the judge for signature. This being so the consent of the parties that the judge might delay the settlement and signature did not have the effect to cause any more delay than would have occurred if the judge had delayed the matter without such consent. The defendant was not to blame for the delay beyond the time named in the stipulation. He appears to have done all he could to procure the settlement of and

signature to the bill, and he cannot be prejudiced by the delay of the judge. The bill of exceptions shows on its face that the several exceptions taken by the defendant were taken and allowed at the trial and before the verdict. The cases cited by the plaintiff—*Walton v. U. S.*, 22 U. S., (9 Wheat.) 651; *Ex parte Bradstreet v. Thomas*, 29 U. S. (4 Pet.) 102; *Sheppard v. Wilson*, 47 U. S. (6 How.) 260, 275; *Muller v. Ehlers*, 91 U. S. 249; and *Coughlin v. Dist. of Columbia*, 106 U. S. 7—do not contain anything in conflict with this ruling. It is supported by *U. S. v. Brietling*, 61 U. S. (20 How.) 252. The motion to strike out the bill of exceptions is therefore denied.”

Davis v. Patrick, 122 U. S. 138.

Approved in *Waldron v. Waldron*, 156 U. S. 361, 378, where the court said:

“The motion to dismiss or affirm is without merit. The signing of the bill of exceptions after the expiration of the term at which the judgment was rendered, was lawful if done by the consent of parties given during that term.”

It may, indeed, be safely said that wherever there is an order of court, or an express consent, or such conduct as would equitably estop the opposite party from denying that he had consented, a bill of exceptions may be settled, signed and filed after the expiration of the term at which the judgment was rendered and entered (see in support of this, *inter alia*: *Ex parte Bradstreet*, 29 U. S. (4 Pet.) 102; *U. S. v. Brietling*, 61 U. S. (20 How.) 253; *In re Chateaugay Iron Co.*, 128 U. S. 544; *Ward v. Cochran*, 150 U. S. 597; *Freeman v. U. S.*, 227 Fed. 732, 740; *Lumber Co. v. Chapman*, 74 Fed. 450; *Gulf Ry. v. Jackson*, 64 Fed. 79). In *Ward v. Cochran*, *supra*, an order of court was

made during the judgment term continuing the cause for the purpose of settling the bill, and the bill was recognized although settled and signed after the term, and although “the defendant protested against the “ action of the court in extending the time and in “ allowing and signing the bill of exceptions after the “ expiration of the term at which the judgment was “ rendered” (150 U. S. 602 *ad finem*): in the cause at bar, the plaintiff below requested and obtained a stipulation extending his time to propose amendments, far beyond “the expiration of the term at which the “ judgment was rendered”; and upon that stipulation the lower court, without any protest from plaintiff, and in furtherance of the very stipulation that he had requested, made its order in accordance with the stipulation (353-4), whereby the settlement of the bill was deferred, not to the injury, but for the benefit, of the plaintiff: this order was made during the judgment term; and although, on February 6, 1917, after the plaintiff had accepted and received the benefits of the stipulation and order, and after the judgment term, in consequence of said stipulation and order, had expired, the plaintiff, like the defendant in *Wood v. Cochran*, sought to object to the doing of an act that he himself had delayed, yet we feel that the attitude thus disclosed will not escape the penetrating vision of this court. In the other cases cited, which are not all that might be cited, the view for which we contend is upheld: in *Gulf Ry. v. Jackson*, *supra*, the Circuit Court of Appeals for the Eighth Circuit held binding as a consent an indorsement approving a bill of excep-

tions, and that “the defendants in error ought not “to be permitted to revoke or evade it now”: in the cause at bar, it is agreed that the bill of exceptions is “correct” and that the same may be made a part of the “records in the above-entitled cause” (356); and an examination of the other cases will disclose either the absence of any order of court, or the absence of consent, or the absence of such circumstances as would make it inequitable to disregard the bill of exceptions. It is therefore respectfully submitted that the objections of the present defendant in error should not prevail.

THE RULE AS TO ERROR.

If there be error apparent on the face of the record, a presumption of prejudice arises, which cannot be disregarded, unless the record affirmatively discloses that the error was not prejudicial.

In approaching the consideration of the errors which, with great respect but with equal firmness, we insist were committed by the learned judge of the court below, it may not be amiss to observe that it is the right of every litigant to enjoy a trial according to law—to have the same character of trial, governed by the same established rules of evidence and procedure as are applied in other cases. Due process of law is law in its regular administration through courts of justice (*2 Kent, Comm.*, 10); and as Justice Field said of the words “due process of law”, when applied to judicial proceedings,

“they mean a course of legal proceeding according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights”.

Pennoyer v. Neff, 95 U. S. 714.

“The meaning”, said Webster in his well-known definition of the phrase “the law of the land”,

“is, that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules that govern society”;

and, as observed in *Ex parte Wall.*, 107 U. S. 265,

“in all cases that kind of procedure is due process of law which is suitable and proper to the nature of the case and sanctioned by the established usages and customs of the courts”.

Consequently, uniformity in the administration of justice is a fundamental right, and every litigant may demand that his case shall be tried by the same established rules of procedure and evidence as well as upon the same principles which are applied to other like controversies: to secure this uniformity is an important function of an appellate court: a litigant who has been denied a trial according to the law of the land has, in a legal sense, been aggrieved; and it is his right to bring his grievance to an appellate court to the end that it may be adequately redressed. And hence it is that, as far back as 1866, we find the Supreme Court of California defining substantial justice to be

“Such justice as the law administers *when correctly applied*, and not such as may be dictated by the abstract and varying notions of an individual as to what the equities of the case may be.”

Stringer v. Davis, 30 Cal. 318, 321.

In view of these considerations, it is with some confidence that we appeal to the proposition which is formulated as a syllabus to this section of this brief; and that confidence is strengthened by the unbroken line of authorities which support that proposition, some of which may here be cited (*Vicksburg Ry. v. O'Brien*, 119 U. S. 99: *Mexia v. Oliver*, 148 id. 664: *Choctaw Ry. v. Holloway*, 114 Fed. 465: *Chicago Wrecking Co. v. Birney*, 117 id. 811: *U. S. v. Gentry*, 119 id. 70, 76: *U. S. v. Hon. Plant Co.*, 122 id. 583: *Resurrection Mg. Co. v. Fortune Mg. Co.*, 129 id. 668: *U. P. Ry. v. Field*, 137 id. 14, 18: *Nat. Biscuit Co. v. Nolan*, 138 id. 6, 9: *Armour & Co. v. Russell*, 144 id. 614, 616: *Sparks v. Ferr*, 146 id. 371: *Inman Bros. v. Dudley Lumber Co.*, 146 id. 449: *Miller v. Ferr.*, 149 id. 330: *Sprinkle v. U. S.* 150 id. 56: *Cook v. Foley*, 152 id. 41, 48: *Mutual etc. Ins. Co. v. Heidel*, 161 id. 535: *Norfolk etc. Traction Co. v. Miller*, 174 id. 607: *Consul. Grocery v. Hammond*, 175 id. 641: *Stewart v. Brune*, 179 id. 350).

And we submit that the view which we are here urging is of special pertinency in a jury trial. As observed by the Court of Appeals of New York:

“Jury trials should be strictly confined to the issues made, and to the legitimate facts bearing upon them, and the practice of dragging in extraneous matters to influence the jury cannot be too strongly condemned. Upon a closely contested question of fact, slight influences may turn the scale, and every rule of propriety and justice demand that nothing outside of the legitimate facts should be introduced to affect the minds of those who are to decide the question.”

O'Hagan v. Dillon, 76 N. Y. 171-3.

And Cf. *Jamieson v. Elevated Ry.*, 147 id. 325.

Insufficiency of Evidence.

THE EVIDENCE IN THIS CAUSE WAS AND IS INSUFFICIENT TO
SUPPORT THE VERDICT OF THE JURY.

1. The Case, as Made by the Plaintiff Himself, Establishes That Any Damage Done Is Explainable, Not Upon the Theory That a Warranty Was Breached, but Upon the Theory That the Skinner Dairy Was Insanitary.

Assignments 1, 3, 4, 6, 9, 10, 14, 15.

The general statement of this case heretofore made goes into the insanitary condition of the Skinner dairy, and the details there referred to need not be repeated here. That general statement further establishes—and this is a matter of common sense—that insanitary surroundings not only originate, but also propagate, infectious and/or contagious diseases. And taking together all that we know of the dairy in question—its unprogressiveness, its disregard of the most ordinary precautions, its lack of a proper barn, its absence of proper flooring in the milking shed, its want of stanchions, its tainted water, its mud holes, its unclean cattle, its general dirt, etc.—it is impossible, we submit, to find in this record, as sustaining the plaintiff's theory, that satisfactory evidence “which ordinarily produces “moral certainty or conviction in an unprejudiced “mind”, and which alone will justify a verdict (Cal. Code Civ. Proc., Sec. 1835); and when we reflect that most of our information as to conditions upon this dairy was drawn from the plaintiff himself—who would not be human if he did not represent conditions in the light most favorable to himself,—our view that, if any damage was done to plaintiff's cows, such damage

cannot fairly be attributed to the mechanical milker, but must be treated as the inevitable consequence of the insanitary environment of the animals, becomes immeasurably strengthened. On the other hand, no witness in the case was able to point out, specifically and particularly, any defect in the milker *qua* machine: beyond generalities of the vaguest tenuity, no criticism was made of the machine that is worth a moment's consideration; and while it was agreed by the company that any defective part would be replaced without charge upon notice, etc. (114), yet, nowhere throughout this record, is it established that any notice ever was given by this defendant in error of any such mechanical defect. And if there be a fact thoroughly established in this cause, it is that infectious mammitis cannot be mechanically originated: the very nature of the complaint shows that this must be so; and no proof was anywhere made by plaintiff that this disease could arise in the absence of the infecting germ.

When, therefore, we are confronted with a case wherein, upon the one side, we find a grossly insanitary environment, and conditions such as may readily generate infection, and wherein, upon the other side, we have a milker mechanically free from defect and, of itself, incompetent to originate infection, it surely cannot be a matter calling for special intellectual penetration to perceive where the preponderance of the evidence rests: in such a case, but a single inference can be justified, and that inference absolves the milker from responsibility for the asserted damage. The burden of proof rested upon the plaintiff: it was his

duty, not to leave a jury to guess among conflicting conjectures, but to establish his cause of action by such satisfactory evidence as would generate moral certainty or conviction in an unprejudiced mind; and this, we submit, the plaintiff has failed to do.

And even if it be conceded, purely for argumentative purposes however, that the evidence in support of these two theories was evenly balanced—was as consistent with one theory as with the other, yet that would not help the plaintiff to satisfy the rule as to the burden of proof. It was laid down by the Circuit Court of Appeals for the Eighth Circuit that

“a theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. If the facts are consistent with either of two opposing theories, they prove neither.”

U. S. Fidelity Co. v. Des Moines National Bank,
145 Fed. 273.

And in the cause at bar, where the cause of the damage to the cows is sought to be explained upon conflicting theories, plaintiff asserting that cause to be the mechanical milker, and defendant insisting that, *inter alia*, the cause was the wretched conditions upon plaintiff's dairy coupled with his failure to respect the “conditions of sale” of the milker (113-4), the evidence as to this cause was wholly circumstantial—was wholly a process of argumentative inference from the facts of a status to the cause of that status. Witnesses tell us of conditions at the dairy; they tell us of the mode

of user of the milker; they describe the condition of the water that the cows waded in, and that was used to wash dairy utensils; they tell us of the physical condition of the cows: but no witness is produced who can do more than state his opinion, inference or conjecture as to the cause being searched for.

In the cause at bar, the answer of the present plaintiff in error set up the unclean and insanitary condition of the plaintiff's premises, and the failure of the plaintiff to keep his premises in a sanitary condition, and any injuries inflicted upon plaintiff's cows were there assigned to this insanitary condition as their cause: no man, we submit, can read this record without perceiving that the insanitary condition claimed was made out; but while the plaintiff attempted to claim that the mechanical milker was the cause of the injuries to the animals, yet he made no real attempt to establish that those injuries were not caused by the unclean and insanitary condition of the premises; and where the surrounding circumstances are such as to leave it equally open to inference that the injuries were caused by the unclean and insanitary environment of the animals—where, in other words, the evidence fails to exclude causation other than the mechanical milker,—it cannot be said that the plaintiff has sustained the burden of proof impressed upon him by law. As observed by Justice Van Devanter in the case last cited:

“Passing, for the moment, the fact that Kelley neglected to make a daily count of the money in the reserve chest, it is plain that the evidence bearing upon the cause or occasion of the loss was altogether circumstantial, and was as consistent with the theory that the

loss was occasioned solely by the personal dishonesty of one of the other employes, to whom the money in its exposed condition was easily accessible, as with the theory that it was occasioned by the personal dishonesty or culpable negligence of Kelley. Which theory was correct was left to mere conjecture. The bank had the burden of proof, and, as it failed to produce any evidence reasonably tending to establish the latter theory to the exclusion of the other, the guaranty company was entitled to a directed verdict in its favor. *Asbach v. Chicago etc. Ry Co.*, 74 Iowa 248, 37 N. W. 182; *Smith v. First National Bank*, 99 Mass. 605, 97 Am. Dec. 59; *Crafts v. Boston*, 109 Mass. 519; *Morley v. Eastern Express Co.*, 116 Mass. 97; *Searles v. Manhattan Ry. Co.*, 101 N. Y. 661, 5 N. E. 66; *Ruppert v. Brooklyn Heights R. R. Co.*, 154 N. Y. 90, 47 N. E. 971; *Chicago etc. Ry. Co. v. Rhoades*, 64 Kan. 553, 68 Pac. 58. As was well said by the Supreme Court of Iowa in *Asbach v. Chicago etc. Ry. Co.*:

‘A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent, merely, with that theory, for that may be true, and yet they may have no tendency to prove the theory.’

The case of *Smith v. First National Bank* is well in point. It was an action to recover the value of bonds deposited with the bank for safe-keeping and alleged to have been lost through its negligence. There was no evidence of negligence, except that which resulted by inference from the fact of loss, and the surrounding circumstances were such as to leave it equally open to inference that the bonds had been stolen by one of several persons who had access to the vault in which the bonds were kept. For a loss in the latter mode the bank was not responsible. The court, after observing that the plaintiff had the burden of proof, and that its evidence failed to exclude the possibility of loss by other means than negligence of the defendant, and left the

case to be decided by mere inference, without any facts to determine which inference was correct, said:

‘There being several inferences deducible from the facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover. There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is essentially wrong.’ ”

U. S. Fid. Co. v. Des Moines Nat. Bank, 145 Fed. 273, 279-280,

and see this case followed:

Vernon v. U. S., 146 Fed. 121, 124.

2. The Amount of Damages Allowed Was Not Justified by the Evidence.

Assignments 5, 11, 13.

In his charge to the jury, the learned judge of the court below limited the recovery of the plaintiff to the damages pleaded. He said:

“In regard to damages, I instruct you that the plaintiff sets out certain damages which plaintiff claims he is entitled to. He cannot recover any different or other damages than that specified in the amended complaint and the amendment thereto. These two papers you can have with you when you consult, if you so desire.”

What elements of damage, then, were “specified in ‘the amended complaint and the amendment thereto?’” An examination of these papers will disclose the following:

Loss caused by injuries to cows,	\$2,005.00
Loss of butter fat,	1,500.00
Loss caused by purchase and installation of mechanical milker,	1,007.00
Loss caused by pasturage,	420.00
	<hr/>
Total,	\$4,932.00

The verdict allowed damages in the amount of \$3763.92, but how this result was obtained we are at a loss to discover. Under Section 3281 of the California Civil Code, every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages; and as the same code provides (Sec. 3282), “detriment is a loss or harm “suffered in person or property”. Not only, then, does loss or harm constitute the basis upon which alone damages are recoverable, but the same code recognizes the three distinctive characteristics of the legal conception of damages, namely, proximateness, certainty and reasonableness. Thus, for example, in Section 3300, proximateness is recognized, just as that characteristic was recognized by the learned judge of the court below (298-9, 301): the principle that damages must be certain and clearly ascertainable, is incorporated into Section 3301; and the view that damages must be reasonable is adopted in Section 3359. There is, therefore, no right to damages where there is no “clearly ascertainable” loss: such loss must be, not only the natural, but also the proximate, consequence of the wrong (*Smith v. Bolles*, 132 U. S. 135); and,

necessarily, vague, indefinite, remote, consequential or uncertain results are not to be embraced within the compensation given by damages, because it cannot be certainly known that they are attributable to the wrong, or whether they are not rather connected with other causes.

The pleading of this defendant in error claims \$2005 for alleged injuries to his cows: the evidence produced in support of that claim is not free from ambiguity: but since the other objections to the amount of the award seem so convincing, it may perhaps be in the interests of expedition to direct attention to them. Take, for example, the item of \$1007 for loss caused by the purchase and installation of the mechanical milker: what does the record exhibit as to this? At page 140, the plaintiff states, "I paid to the Sharples " Separator Company for the three unit milking " machine the sum of \$461.46, as my check shows"; and \$461.42 was then the purchase price, and no greater sum. It nowhere appears that Mr. Skinner expended a single dollar for the "installation" of the mechanical milker: on the contrary, the contract provided in terms for "Units and Equipment *installed* " *complete* with instructions to my operators" (113); and Skinner tells us that the company complied with this requirement, saying that "the Sharples people sent " Mr. Reed to install the machine; he did so; he was " to install the machine and instruct my men and " me as to how to run and operate the machine, and " was to stay until he was satisfied and we were satis- " fied that we could operate the machine. He installed

“ the machine and proceeded to run it, start it up
 “ and got it to going; and after the machine was
 “ installed and we got everything going, he said he
 “ thought the boys could run it all right with my
 “ help and with assistance from the printed literature
 “ he had left there with the different instructions he
 “ left” (118). The purchase price being only \$461.42
 “ as my check shows” (140), by what right, then, could
 Mr. Skinner claim, or this jury allow, a single dollar
 for “installation”? And yet, to account for this ver-
 dict, an allowance for “installation” must have been
 made.

It appears from Mr. Skinner’s statement that there
 was an item of \$175.00 for an engine, and another
 of \$370 for lumber, cement, lime and nails: it does not
 appear whether the engine was new when he bought
 it, or from whom he purchased it: but it does appear
 that he procured the lumber, cement, lime and nails
 from the Imperial Valley Lumber Company. So far
 as these items are concerned, what “clearly ascertain-
 able” loss has Mr. Skinner established as a basis upon
 which to claim that he was damaged? In speaking of
 these items, Mr. Skinner said: “I have set out in my
 “ bill of particulars that I paid \$175 for an engine;
 “ that was a gasoline engine; I still have that engine;
 “ I am using it in running my separator; and I have
 “ used it at all times to run my separator; I use it
 “ because I had it and I could not dispose of it; I
 “ never had one before I bought it to run this machine
 “ with. I do not consider that it is worth anything

“ to me to run the separator with, because I have to
 “ pay my men the same to separate it by hand; I
 “ suppose it is of some value; it is in good shape
 “ and was in good shape when I ceased using the
 “ milking machine. I set out in my bill of particulars
 “ that I expended \$370 purchasing lumber to build
 “ stanchions for my cows; that was built for the pur-
 “ pose of installing this machinery. I paid \$370 for
 “ lumber to build stanchions with; I am using those
 “ stanchions now; and I have continued to use them
 “ ever since I installed them” * * * “I have not
 “ any check of the amount I paid the lumber company;
 “ I bought the lumber from the Imperial Valley Lum-
 “ ber Company; that lumber bill includes cement, lime
 “ and nails. I put the cement underneath; I cemented
 “ the floor where the cows stand, and that cement is
 “ still there. It is not customary in Imperial Valley
 “ for dairymen who desire to run a clean dairy to
 “ cement their floors—it is not a custom; most of
 “ them have just an ordinary dirt floor” (140-141).
 And speaking of the same topic, Mr. Briggs testified,
 quite without contradiction, “I have visited a great
 “ many dairies throughout the country. The average
 “ dairy is equipped with a cement floor and with
 “ stanchions; and that is true whether they are using
 “ a machine or not. I saw the gasoline engine which
 “ Mr. Skinner was using on his place; I believe it was
 “ an International. I am familiar with the value of
 “ machinery such as gasoline engines, after they have
 “ been used for a short period of time; I have sold
 “ them. In my opinion, presuming that Mr. Skinner

“ paid \$175 for the gasoline engine in question about
 “ February 1, 1914, the value of that engine in use
 “ in December of that year would be fifty per cent,
 “ fifty cents on the dollar; I think I could sell it for
 “ that price. If a man were using it for separating
 “ milk from ninety cows, the value of it to the man
 “ so using it would be the price of it when new”
 (231-2). In view of these disclosures what loss has
 Mr. Skinner sustained that he should be permitted
 to claim, or the jury to allow, damages as for these
 items? Very obviously, the learned judge of the
 court below could see no damage to Mr. Skinner in
 this connection, because he told the jury that: “Plain-
 “ tiff claims damages in the sum of \$1007, being the
 “ purchase price and cost of installation of the milking
 “ machine purchased from the defendant Sharples
 “ Separator Company. It appears from the evidence
 “ that of said sum of \$1007, only \$461.42 was paid
 “ by the plaintiff to the defendant Sharples Separator
 “ Company for the milking machine containing the
 “ three units, and that the balance of \$1007 was for a
 “ gasoline engine, for the lumber to build his stan-
 “ chions, and for sand and gravel used by the plaintiff
 “ in making a cement floor for his milking shed. If
 “ your verdict in this case should be for the plaintiff
 “ and against the Sharples Separator Company, you
 “ are instructed that in arriving at the amount of
 “ damages to be allowed to plaintiff for moneys
 “ expended in the purchase and installation of the
 “ machine you should deduct from the said sum of
 “ \$1007 the reasonable value to the plaintiff of the

“ milking machine, of the gasoline engine so purchased,
 “ of the stanchions so built, and of the cement floor
 “ so installed by the plaintiff” (299-300). But any presumption that the jury were guided by this instruction is repelled by the verdict which cannot be explained except upon the theory that this instruction was disregarded and an allowance made to the plaintiff for these items.

And another reason why the amount of damages allowed was not justified by the evidence is to be found in Mr. Skinner's claim of loss in butter fat. In his amended complaint, Mr. Skinner puts this alleged loss at \$1500: but the showing of fact sought to be made to support this claim is of such a character that, in our opinion, the entire item should be disregarded—certainly, the jury had no coherent showing before them upon which to make an intelligent award. For example, in the amended complaint, Mr. Skinner claims \$1500, but in his bill of particulars he exhibits figures which are not without significance in the appraisement of this claim. The following are the figures taken from the bill of particulars:

1914, January,	1620 lbs. at 22¢	\$356.40
1914, February,	1493 lbs. at “	328.46
1914, March,	1925 lbs. at “	423.50
1914, April,	1975 lbs. at 25	493.75
1914, May,	1834 lbs. at 24	440.16
1914, June,	1377 lbs. at 26	358.02
1914, July	1732 lbs. at 25	433.00
1914 August	1683 lbs. at 25½	429.16
1914, September	1585 lbs. at 27½	435.87

1914, October,	1611 lbs. at 31¢	\$499.41
1914, November,	1482 lbs. at 34½¢	511.29
1914, December,	1469 lbs. at 30	440.70
Total		<hr/> \$5,149.72

And in speaking of these figures, Mr. Skinner states in his bill of particulars: "Herewith is given a list by " the month of the pounds of butter fat delivered to " Imperial Valley Creamery and Delta Creamery during the year 1914, with the price per pound for " butter fat for each month. Plaintiff has not in his " possession at the present time a record of butter fat " given for the preceding year but knows that the " amount delivered by him to the creameries was less " in the year 1914 and 1915 than in 1913" (292-3).

It is to be observed that in the figures as we state them above no attention is paid to fragments of a pound except to this extent that where the fragment is less than half a pound it is disregarded, and where it exceeds half a pound the whole number is correspondingly increased. In the next place, the excerpt from the bill of particulars as printed in the record does not state the price per pound for the months of January and February, but in the figures as we state them in this brief that price is put at 22¢ per pound: there is no proof that we can recall of the price per pound during the two months mentioned, and we have been compelled to assume that the March price was a relatively probable one, especially in view of Mr. Skinner's attitude on this point as revealed

on page 137—he evidently thought that 22 cents was the January price. It is next to be observed that the figures given above are for the output of butter fat to December, 1914, only; and they do not profess to run to July 6, 1915, when this litigation originated in the state court. The mechanical milker was not used after December 20, 1914 (134): but, as Mr. Skinner tells us, “I estimated the loss of butter fat up to the time this “suit was brought; I computed the loss of butter fat “right down to the date this suit was filed, in arriving “at the \$1500” (138); and not only is there no more proof of the output of butter fat in 1915 than there was of the output in 1913, but also there was no proof whatever of any output at all during the first six months of 1915. And finally, it is not improper, in view of Mr. Skinner’s claims as to the alleged havoc caused by this wicked milker, to point out that the plaintiff’s own figures go far to refute his claims. He has told us in his direct examination that “up to June “25th, none of the cows had sustained any permanent “injury” (120): yet the months of November and December show an output practically equal to that of February: the months of September and October show an output reasonably approximating that of January—when the wicked milker had not yet made its appearance; and the months of July and August, coming immediately upon the heels of the asserted “permanent “injury” of June, show an output in excess of that of January, during which last mentioned month no milker was on the Skinner premises to be charged with derelictions of which it was innocent.

But, taking the year 1914 from January to December, the figures show that he received \$5149.72 for butter fat: still, *speculation and conjecture apart*, where is the *proof* that, if it had not been for the mechanical milker, he would have received the \$1500 additional that he now claims to have lost? In his bill of particulars, Mr. Skinner tells us that “plaintiff has not “ in his possession at the present time a record of “ butter fat given for the preceding year but knows “ that the amount delivered by him to the creameries “ was less in the year 1914 and 1915 than in 1913” (292): but if it be true that the amount delivered in 1914 was less than in 1913, why was not that fact established? Why was not some witness, some document, some circumstance produced in aid of this assertion? And if the 1914 delivery was less than that of 1913, why were we not told how much “less” instead of being left to grope among uncertainties? Certainly, if the 1914 delivery were seriously “less” than that of 1913, the plaintiff could and would have stated it, especially as in the “compilation” of the butter-fat record he had the assistance of counsel (137): but nowhere, conjecture apart, can any certain basis be found for this claim of \$1500. It is in this connection that an instance of Mr. Skinner’s failure to answer without evasion presents itself. Having admitted the unreliability of the figures set forth in that part of his bill of particulars which related to the butter fat, he was then asked the following question, and gave the following answer:

“Q. Then, what months are correct, except June, “as to the amount of butter fat which you sold from “your herd as nearly as you could determine it from “the records of the Creamery? A. Well,—yes” (138-9). The lucidity of this reply would have made Quintilian gasp and stare.

And what adds to the confusion and uncertainty, is the confession of the plaintiff that his figures are not correct. At page 138, he states: “The amount of “butter fat that I received each of the months of “1914, as set out in this bill of particulars, and the “price at which I sold butter fat those months, is “not correct for all the months”: under these circumstances, how could the rule that damages must be certain and clearly ascertainable have been respected by the jury? This, however, is not the only instance in which, in this very connection, Mr. Skinner has shown himself a misleading guide. At page 126, he declares that “in June and July my cream check dropped “\$142.13; it never did go back up again”. But in June, his cream check did not drop \$142.13: in July, his cream check did not drop \$142.13: his cream check did in fact go back up again; and with these exceptions, Mr. Skinner’s statement is trustworthy—is as reliable as many more. The plain truth, demonstrated from his own figures, is that in June, his cream check dropped \$82.14: in July, his cream check was increased by \$74.98; and from August to December, there was a constant and continuous increase in his cream check, the poorest months being August with

an increase of \$71.14 over June, and December with an increase of \$82.68 over June. Again, we ask upon what basis is this man's \$1500 guess to be considered as sufficient to authorize this jury to take away the funds of this company and give them to the plaintiff?

But this is not all: at page 126, still dealing with this \$1500 claim, he indulges in further conjecture, and says, "If they had not used this milker the cows "would, in my opinion, have held up": but what facts were either within his knowledge or laid before that jury to justify this speculation of our distinguished sanitarian? There were none, and such few relevant facts as may be extracted from the record show that no foundation for the statement existed. He claims that if they had not used the milker the cows would have held up: but, upon his own figures as given in his bill of particulars, the average monthly money return to the end of May, 1914, was \$408.45/100 per month, while the average monthly money return from the end of May to the end of December, 1914, was \$443.92/100 per month: did the cows "hold up"? And so, too, with the output in pounds: in January, 1914, before any milker ever appeared upon the premises, the monthly output was 1620 pounds, but the average monthly output for the rest of the year was 1650 pounds: did the cows "hold up"? And where is that certain proof of real damage required by law? The plain, unvarnished fact is that the solitary witness who assumed to deal with this \$1500 item was the plaintiff himself: none of the other witnesses had a word to say upon the subject; and the plaintiff's state-

ment (126) was not one of concrete fact, but a mere barren guess as to “the expected fruits of an unrealized “speculation” (*Smith v. Bolles*, 132 U. S. 125, per Fuller, C. J.: *Moulthrop v. Hyett*, 195 Ala. 493:). As we shall see hereafter, in another connection, damages are not to be determined by the opinions of witness; and as remarked by the Supreme Court, “the court “might properly decline to permit one of the defendants to testify in general terms what he estimated “the amount of their damages to be, when he had “not testified to the items of damage, or to any facts “upon which his opinion was based” (*Dushane v. Benedict*, 120 U. S. 630, 647). This, however, is precisely what Mr. Skinner was allowed to do; and it was all the more erroneous because he was giving his opinion, not as to a concrete actuality open to verification, but to a mere conjecturality. We respectfully insist that no proper proof of this \$1500 item was made, and that therefore it could not have been rightly considered by the jury.

Upon the whole, then, upon this branch of the case, we submit that, even allowing the claims of the plaintiff for injuries to the cows and for pasturage—claims which we deny and contest,—still, the amount of damages awarded by the jury was not justified by the evidence. The allowance made by the jury was \$3763.92: but reducing the \$1007 item to \$461.42, and eliminating the unproved \$1500 item, the outside allowance would be \$2886.42. But nothing here said should be taken as any concession by us that this plaintiff is entitled to any damages whatever: on the contrary, we insist that upon the whole case he is entitled to none.

3. **Assuming for Argumentative Purposes That the Record Discloses Damage, Yet No Verdict Against This Plaintiff in Error Was Justified, for the Reason That the Evidence Wholly Failed to Establish That Such Damage Was Caused by the Sharples Three Units, Rather Than by the Edgar One Unit.**

Assignments 2, 11, 12, 33, 40.

It appears from Mr. Skinner's testimony that, originally, he purchased three milker units, and, later, purchased a fourth unit. The original three units were purchased by him from this plaintiff in error under the instrument set out on pages 112-114 of the record: but the fourth unit was purchased by him from Edgar Bros. Co., which company was not, at the time of the purchase of this fourth unit, a selling agent for plaintiff in error (118-9: 232-3). Speaking of the purchase of this fourth unit, Mr. Skinner tells us: "We proceeded to milk the cows with the machine; "it took the milk away from the cows all right; and "after we had been running the machine some length "of time, I saw that the third unit was not practicable "for two men—the two men could take the two units "a piece and operate the two units; each man would "milk and strip his own cows and we could get along "faster; they could manage the work better; so I "went to Mr. Edgar Bros. and told him I wanted "another unit" (118-9); and in his amended complaint he states that the fourth unit was delivered about May 6, 1914 (61). In this amended complaint, Mr. Skinner alleges that the same warranties and representations were made regarding the fourth unit as had been made regarding the original three units:

but, as pointed out in our general statement of this case, this allegation is not supported by the evidence: on the contrary, Skinner tells us “I went to Mr. Edgar and he ordered the fourth unit for me; “there was nothing said about paying for the unit; “I just told Mr. Edgar to order the fourth unit for “me, and he did; this fourth unit was charged to me “by Edgar Bros. from whom I have received state- “ments for it. I did not communicate with any “officer or employee of the Sharples Separator Com- “pany when I bought the fourth unit,—I communicated “with no one except Edgar Bros.; I never received “any bill from Sharples Separator Company for the “fourth unit” (174).

It appears from Mr. Skinner’s story that, to use his own words, “I first began to use the machine “about the 7th of February, I think; and I think I “received the fourth unit from Edgar Bros. in May; “and I took the fourth unit from Edgar Bros. and “connected it up and used it after that—after May” (136): but, during the interval between February 7th, when he began the user of the three units, and May 6th, when the fourth unit was delivered (61), he had been, again to use his own words, “running the machine “some length of time” (118 *ad finem*). During this period, however, according to the allegations of his pleadings and the burden of his testimony, he had been “running the machine,” without mishap or trouble. In his amended complaint, he tells us plainly that the purchase of the fourth unit was made “before” any discovery by him of injury to his cows by the

original three units: if, by this language, he means to intimate that there might have been some undiscoverable injury, it is evident that such injury, if it existed at all, was sufficiently infinitesimal to be invisible: indeed, it would be most extraordinary if during this period any injury to those cows could have escaped the attention of Skinner, or his wife, or his son, or his hired young man; and if, as Skinner claims, the herd was “a selected herd of cattle that I had “been selecting for since 1911, I began on that herd “and I had been cutting out the poor milkers until I “had built up an extra good herd of cattle” (111), that he “had been selecting for since 1911” (id.), it would be to overleap the bounds of human credulity to suppose that, if the original three units were really, prior to the purchase of the fourth unit, injuring these selected cows, Skinner, the dairyman, could or would have failed promptly to discover that fact. And the view that trouble among the cows followed upon the purchase of the fourth unit, finds confirmation in Skinner’s suggestive statement that “I had been running “the machine; the fourth unit came; trouble *began* “to develop; my cows *began* to have swollen quarters; “and by swollen quarters I mean one teat, two teats, “three teats and sometimes four” (119). On this same page, he indulges in the somewhat contradictory and unspecific statement that “before this fourth unit “came this trouble began to develop”; and while at another place hereafter referred to, he repeats this contradiction, yet the burden of his testimony makes it quite clear that, during the three months time when

he operated the original units, and before the appearance of the fourth unit, he had no real grievance based upon injury to his cattle. Thus, on page 120, he tells us that "up to June 25th, none of the cows had sustained any permanent injury"; and on page 136, he speaks of having had "other trouble before I got the fourth unit", but as to the character or extent of that trouble he has nothing to say. At page 144, he makes this statement, "I had trouble with quite a number of my cows which were in a diseased condition, and had caked udders before I connected the fourth unit, not before I had ordered it; I could not tell you the number, but I should say 15 or 20 cows were affected before I put the fourth unit on": but if 15 or 20 cows were diseased and had caked udders before he connected the fourth unit, why did he connect it? Does he mean that he continued to milk diseased cows? He nowhere claims more than 100 cows: at page 111, he speaks of "85 to 100 cows": the fourth unit made its appearance on May 6, 1914: on page 139, he tells us that "in June, 1914, we were milking 100 cows"; and as he states on page 120, "up to June 25th, none of the cows had sustained any permanent injury": how can he expect to be taken seriously in the declaration that, before he connected the fourth unit, 15 or 20 cows "were in a diseased condition and had caked udders"? At page 147, he tells us that "I had ordered this fourth unit, and it came: I ordered it before I had any serious trouble"; and at page 151, *ad finem*, in speaking of "the 20 cows", he plainly shows that, according to his claim, they

were injured in June and July, long after the appearance of the fourth unit. And finally, in his bill of particulars, a carefully drawn document in the preparation of which he enjoyed the advice of counsel, he confesses that “all four units were in use before any “ of plaintiff’s cows were seriously injured” (291). Taking together, then, the whole of his statements upon this matter, we submit that no serious injury accrued to any of the plaintiff’s cattle until after the fourth unit entered “in use”.

From this discussion of the evidence, it is clear that a period of about three months intervened between the purchase of the original three units from the plaintiff in error and the fourth unit from the Edgar Bros. Company: that with the purchase of this fourth unit, the plaintiff in error had nothing to do: that the plaintiff in error made no warranty or representation of any character concerning this fourth unit; and that the evidence in the case throws no light upon the history or antecedent environment of this fourth unit itself—what its characteristics were, where it had been kept, what degree of care protected it, whether it was exposed to infection, or to contagious influences,—all this and more, is left undisclosed by this defendant in error who, in the court below, was seeking to impress upon the plaintiff in error a liability for damages. And in the next place, taking together all of the relevant testimony, it is quite clear, as the plaintiff himself is compelled in his deliberate bill of particulars to confess, that no serious injury accrued to any of his cattle until after this fourth unit entered

into use: it was only after the fourth unit entered into use that serious trouble "began to develop" (119).

But this is not all. It appears from the record quite unmistakably, that, after the receipt of the fourth unit, it was used generally and indiscriminately among the cows. Upon this proposition of fact, there can be no rational dispute. Thus, on page 136, Mr. Skinner tells us: "as to what cows I used the fourth unit on, " I used the fourth unit the same as the others. The " four units, as nearly as a man could look at them " and say, were identically alike; if a man was to " hand that unit up and another unit up, he could " not go and pick out which were those units. I " kept no record of the cows upon which the particu- " lar units were used. I did not make or keep any " record of the amount of milk obtained from each " individual cow" (136). This plain statement is emphasized upon the recross examination of Mr. Skinner at page 165, where he says: "When Mr. Reed " went down in October, he only used two units at a " time on the 30 that were set aside, and the other " two units were not used; Mr. Reed may have used " all four of them; I don't know which ones he did " use" (165). And finally, not to multiply references, the following passages from Mr. Skinner's bill of particulars are relevant and conclusive: "7. All four " units were in use before any of plaintiff's cows were " seriously injured. The four units were used indis- " criminate,ly, so that it is impossible for plaintiff to " itemize the injury caused by the original three units " as distinguished from that caused by the fourth

“unit purchased by plaintiff after the installation of
 “the machine. No record was kept of the amount of
 “milk each cow gave.

“19. No information can be given as called for by
 “Demand No. 19, owing to the fact that no record
 “was kept of the effect of the use of the three units
 “purchased from defendant as contradistinguished
 “from the effect of the fourth unit subsequently pur-
 “chased but will say that approximately twenty of
 “plaintiff’s cows were ruined from the use of the
 “four units between the 25th day of June, 1914, and
 “the 7th day of July, 1914. The last half of Demand
 “No. 19 appears to be repetition of Demand No. 17
 “and the answer thereto has hereinbefore been given”
 (291-2).

What, then, was the situation presented to the jury?
 Did the evidence discriminate between alleged damage
 claimed to have been done by the Sharples three units,
 and that done by the Edgar one unit? The case, as
 made by the plaintiff, showed that the fourth unit was
 received some three months after the original three
 units, from a wholly different company which was not
 then a selling agent of the present plaintiff in error,
 and unaccompanied by any warranty or representation
 of any character: that it was only after the receipt of
 this fourth unit that, to quote again Mr. Skinner’s
 language, “trouble began to delevop”; and that, again
 to use Mr. Skinner’s language, “all four units were
 “in use before any of the plaintiff’s cows were
 “seriously injured. The four units were used indis-
 “criminately, so that it is impossible for plaintiff to

“ itemize the injury caused by the original three units
 “ as distinguished from that caused by the fourth
 “ unit purchased by plaintiff after the installation of
 “ the machine”. Under these circumstances, how was
 it possible for that jury intelligently to say that the
 asserted damage accrued from the use of the original
 three units rather than from the admitted indiscrimi-
 nate use of the fourth unit, upon whose advent only,
 “ trouble *began* to develop? Prior to the advent of
 this fourth unit, as Mr. Skinner is constrained to
 confess, no serious injury had accrued to any of his
 cows: judging from the facts before us, if that fourth
 unit had not been put into operation, there would have
 been no trouble—*certainly, there is no proof that it*
did not cause the trouble that Mr. Skinner complains of;
 and the trouble that he speaks of may perfectly well
 be traced to the intervention of that fourth unit, in
 which event no verdict against the present plaintiff
 in error would have been justified by the evidence. To
 employ the language of Mr. Justice Shiras, it was the
 duty of the jury, if the defendant below were liable
 at all, to find and measure the amount of damage
 for which such defendant was legally liable: but that
 jury could not, in the absence of evidence measuring
 or showing the amount of damage for which the
 defendant below was legally liable, have intelligently
 performed this duty (*Boston etc. Ry. v. O’Reilly*,
 158 U. S. 334, 336). In the cause at bar, it is conceded
 that “all four units were in use before any of plain-
 “ tiff’s cows were seriously injured. The four units
 “ were used indiscriminately, so that it is impossible

“ for plaintiff to itemize the injury caused by the
 “ original three units as distinguished from that caused
 “ by the fourth unit purchased by plaintiff after the
 “ installation of the machine” (291); and to this concession the language of Mr. Justice Shiras, in the case last cited, may appropriately be applied:

“such evidence is too uncertain to be made the basis of a verdict for damages, and may well be believed to have worked substantial injury to the rights of the defendant” (158 U. S. 336, *ad finem*).

In view of the foregoing facts, it is our contention, generalizing to a principle from instances suggested by the law of master and servant, by the law of negligence, by the law of landlord and tenant, by the law of damages, and by other departments of the law, that where a given or assumed result is attributable to one of two causes, for one of which the party charged is responsible and for the other of which he is not, the duty rests upon the actor to establish that the result in question was produced by that particular cause for which the party charged is responsible; and that where the actor fails to make this proof, he can recover nothing by reason of the result complained of. We think that this principle, which we submit should rule this case and bring a reversal of the judgment below, is sustained by its intrinsic fairness, by every reasonable legal analogy, and by all of the relevant authority, some of which we will now refer to. In the *American and English Encyclopedia of Law*, volume 8, page 548, dealing with the requisites to the recovery of damages, it is said:

“In order that there may be a recovery in damages there must be (1) a wrongful act, (2) loss resulting, (3) adequate proof of both—which last essential is but the broad general rule requiring a plaintiff to make out his case. ‘It is a fundamental principle’, it has been said, ‘applicable alike to breaches of contract and to torts, that in order to found a right of action there must be a wrongful act done, and a loss resulting from that wrongful act; the wrongful act must be the act of the defendant, and the injury suffered by the plaintiff must be the natural and not merely a remote consequence of the defendant’s act. The wrong done and the injury sustained must bear to each other the relation of cause and effect; and the damages, whether they arise from withholding a legal right or the breach of a legal duty, to be recoverable, must be the natural and proximate consequence of the act complained of.’

“As a corollary to the third requirement above stated it has been held that where two or more causes concur to produce an effect, and it cannot be determined which contributed most largely, or whether without the concurrence of both it would have happened at all, and a particular party is responsible only for the consequences of one of these causes, a recovery cannot be had, because it cannot be judicially determined that the damages would have resulted without such concurrence, so that the consequences cannot be attributed to that cause for which the defendant is responsible.”

And in a very well considered decision of a court of good standing, it is said:

“The rule of law requires that the damages chargeable to a wrongdoer must be shown to be the natural and proximate effects of his delinquency. The term ‘natural’ imports that they are such as might reasonably have been foreseen—such as occur in an ordinary state of things; the term ‘proximate’ indicates that there must be no other culpable and efficient agency intervening between the defendant’s dereliction and the loss. * * * Whether an act or omission alleged to be negligence nat-

urally and proximately caused an injury, is, as a rule, a question for the jury. But if there is no evidence connecting the alleged negligence with the injury, or if it is obvious that the act or omission was not the natural and proximate cause thereof, the question is for the court. 21 Am. & Eng. Enc. of Law (2d ed.) 508. Tested by that rule the nonsuit should have been granted.”

Smith v. Public Service Corporation, 75 Atl. (N. J. L.) 937.

Speaking upon this topic, the Circuit Court of Appeals for the Eighth Circuit remarks:

“Damages can only be allowed for that which is the result of the breach of the contract, or of the wrong done. And that which is the result of such breach or wrong cannot be determined by speculation, or argument, or the dependency of one contingency on another.”

W. U. Tel. Co. v. Ivy, 177 Fed. 63, 66-7, citing
Globe Co. v. Landa Co., 190 U. S. 540, 544;
Boston Ry. v. O'Reilly, 158 id. 334;
Primrose v. West. Union, 154 id. 1, 29;
Richmond Ry. v. Elliott, 149 id. 266.

It would be strange if this principle did not find operation in the law of master and servant, and that it does, may, we think, without going extensively into the authorities, be shown by the following summary of the law:

“A master is not liable for injuries to a servant caused by a combination of several causes, where none of the alleged causes of the injury is alone sufficient to render him liable, or where the evidence does not show which of several possible causes, some of which do not involve negligence on the part of the master, produced the injury; and the same is true where the cause of the injury is purely conjectural.”

26 Cyc., 1092.

And so, too, in the law of negligence, we find the same principle recognized and applied. Thus, it was said by the Court of Appeals of the State of New York:

“When the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible, and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damages were produced by the former cause, and he must fail, also, if it is just as probable that they were caused by the one as by the other, as the plaintiff is bound to make out his case by the preponderance of evidence. The jury must not be left to mere conjecture; and a bare possibility that the damages were caused in consequence of the negligence and unskillfulness of the defendant is not sufficient.”

Searles v. Manhattan Ry., 5 N. E. 66, 67.

And it may not be improper to point out that this New York case, just cited, is referred to as authoritative in an opinion by the Circuit Court of Appeals for the Eighth Circuit, wherein that learned court said:

“‘It is not permissible to guess at the cause of an injury, and assume it is something for which the defendant is responsible.’ *Reese v. Clark*, 146 Pa. 465, 23 Atl. 246. The rule, and a sane one, laid down by the Supreme Court, in *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, is that it is not sufficient to show that an accident happened and an injury ensued. The evidence must point out that the negligence of the defendant was the direct cause.

‘Where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion.’ This

rule was recognized by this court in *Chicago & N. W. Ry. Company v. O'Brien*, 132 Fed. 593-597, 67 C. C. A. 421, 425.

'When an alleged injury may have been due to one or the other of two causes, either one of which may have been the sole proximate cause, there can be no recovery unless it is shown that as between the two causes in question it was the negligence of the defendant which caused the injuries.' *Searles v. Manhattan Ry. Co.*, 101 N. Y. 661, 5 N. E. 66; *The Nellie Flagg* (D. C.) 23 Fed. 671; *Hartford Company v. Wise*, 75 Md. 38, 23 Atl. 65."

Minn. Gen. Elec. Co. v. Cronon, 166 Fed. 651, 658.

We venture to believe that the views of Chief Justice Shaw upon a legal proposition are entitled to great respect; and we therefore quote the following language from a carefully considered decision of his as supporting the view to which we are endeavoring to secure the adherence of this court. The learned Chief Justice said:

"The general rule of law, we understand, is, that where two or more causes concur to produce an effect, and it cannot be determined which contributed most largely, or whether, without the concurrence of both, it would have happened at all, and a particular party is responsible only for the consequences of one of these causes, a recovery cannot be had, because it cannot be judicially determined that the damage would have been done without such concurrence, so that it cannot be attributed to that cause for which he is answerable."

Shaw, C. J., in *Marble v. Worcester*, 70 Mass. (4 Gray) 395, 597.

And so, likewise, in a more recent Massachusetts decision, it was laid down that:

"If goods are damaged by two different causes, and the defendant is only responsible for one of them, the burden of proof is on the plaintiff to show the extent of

the damage occasioned by the cause for which the defendant is liable. The plaintiff can recover only for the damage from a cause for which defendant is liable.”

Priest v. Nichols, 116 Mass. 401.

And the view for which we are contending is not dissented from in the State of California, so far as the decisions of that State approach this question. In *Berry v. San Francisco etc. Ry.*, 50 Cal. 435, it was held that a plaintiff cannot recover for an injury traceable, not to the accused party, but to the instrumentality of a third person: in *Durgin v. Neal*, 82 Cal. 595, 598-9, the view was taken that a defendant company could not be held for damages not proximately caused by its own act, and that the lower court erred in finding that the defendant was liable for damages resulting from the acts of other persons with whom the defendant did not appear to have had any connection; and in *Schwartz v. California Gas Company*, 163 Cal. 398, 401-4, a reversal was justified for failure to give an instruction predicated upon the theory that an intervening, independent agency may have been the proximate cause of the injury complained of, in a case where

“while there was no direct evidence that any third party moved said insulator, circumstances do appear from which a rational inference might be drawn to that effect”.

And so, in *U. S. Fidelity Co. v. Des Moines National Bank*, 145 Fed. 273, 279-280, the *ratio decidendi* involved the principle for which we are contending, for it was there held that

“there being several inferences deducible from the facts, the plaintiff has not maintained the proposition upon

which alone he would be entitled to recover * * *
 Where the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is essentially wrong''.

And the view for which we are contending receives further support from *Chicago etc. Co. v. Gelvin*, 238 Fed. 14, where the Circuit Court of Appeals held that where the evidence showed some of the injuries to plaintiff's cattle were not caused by defendant's alleged negligence, and there was nothing to show what proportion of the injuries resulted from such negligence, the jury cannot arbitrarily apportion a part, or all, of the proven damages to the cause for which the defendant was liable. In the course of the opinion in this case, the court said:

"On the face of this record, then, the cattle stampeded at various times at a date some time subsequent to the fire, these cattle suffered damage from scouring through eating green grass, their teeth became sore, and they refused to eat. Yet no damage is predicated by the plaintiff upon these incidents. The plaintiff, however, seeks to recover for the loss of flesh, attributing it to the one cause, and to prove it by testimony of values, first, at a time other than immediately succeeding the injury; second, by showing the prices received for the cattle at a place different and at a date long succeeding the date of the injury; third, by showing the gain of these cattle succeeding the fire, and by expert testimony, attempting to show what they ought to have gained, and therefore a loss of the difference; fourth, by showing the prices of heavy cattle at Chicago at a time long subsequent to the date of the injury in question, with no showing as to comparative market conditions, and showing that these cattle were actually light, assuming that they would have been heavy if they had not been injured, and

therefore that a loss of more than \$1.50 per hundred was sustained by the plaintiff upon the entire herd of cattle.

Instead of this record, it was incumbent upon the plaintiff to show, with reasonable certainty, what damage flowed from the alleged injury, by showing the value of the cattle immediately before and immediately after the injury at the farm of the plaintiff. The record showing different conditions, occurring subsequent to the fire, naturally affecting the gain in weight of these cattle, for which it is conceded the defendant could not be held responsible, without any proof of how much of the damage resulted from these conditions as distinguished from the damage resulting from the alleged injury, with nothing in the way of testimony of any witness pretending to even estimate the proportion of the damage resulting from either of the causes, is far short of that reasonable certainty required by law, and upon such a record a jury cannot arbitrarily apportion a part, or all, of the proven damages to the cause for which the defendant is responsible (*Knowlton v. C. & N. W. Ry. Co.*, 115 Minn. 71, 131 N. W. 858), and the verdict of the jury upon the first cause of action, predicated upon a consideration of this evidence, is erroneous."

And finally, the lower court in the cause at bar actually instructed the jury as follows:

"If you believe from all the evidence that the milking machine, while being properly operated, was the cause of the injury to plaintiff's cows, then you are instructed that the defendant Sharples Separator Company can be held liable only for the damages resulting from the use of the three units purchased from it, and that the defendant Sharples Separator Company is not liable in damages for the use of the fourth unit purchased by plaintiff through Edgar Brothers."

In view of what we have heretofore urged upon this aspect of the cause, we respectfully submit that, to employ the language of the Circuit Court of Appeals,

the verdict of the jury herein is erroneous; and we ask that the error be rectified by a reversal of the judgment.

4. The Evidence Fails to Show the Breach of Any Warranty.

Assignment 7.

The burden of proof rested upon the plaintiff below to show, not only the existence of a warranty, but also the breach of the alleged warranty: not that the machine failed to operate successfully upon his ranch; not that animals became ill; but that the warranty formulated in the specific contract presented, was breached (*Buckstaff v. Russell*, 151 U. S. 626; *Excelsior Coal Co. v. Gildersleeve*, 160 Fed. 47; *Milling Co. v. Manufacturing Co.*, 227 Fed. 804; *Mercantile Co. v. Land Co.*, 171 Cal. 254; *Waltz v. Silveria*, 25 Cal. App. 717; *Implement Co. v. Blodgett*, 24 id. 19). He must show, in other words, some defect of workmanship or material, existing in the machine at the time of its purchase, and proximately contributing to the result which he alleges to constitute the breach; or he must show that, in some respect proximately contributing to the breach, the machine was not, at the time of its purchase, as represented in the printed matter referred to in, but not identified by, the contract itself; or, he must show that, in some respect proximately contributing to the breach, the machine was not, at the time of its purchase, capable of doing the work as claimed in the printed matter referred to in, but not identified by, the contract itself; and a failure to meet these requirements bars recovery.

In the next place, no resort can be had by the plaintiff below, in aid of his claim, to any alleged parol declarations by anybody; because the rule is well settled that, in these matters, a writing excludes all parol warranties (*Seitz v. Brewers etc. Co.*, 141 U. S. 510; *DeWitt v. Berry*, 134 id. 306; *Randall v. Rhodes*, 20 Fed. cases (No. 11576); *Johnson v. Powers*, 65 Cal. 179; *Kullman etc. Co. v. Sugar etc. Mfg. Co.*, 153 id. 732; *German Surety Co. v. Armsby Co.*, 153 id. 594; *Bancroft v. San Francisco Cool Co.*, 47 Pac. (Cal.) 685); and this rule is emphasized by the additional consideration, that, to be available to a purchaser, the warranty upon which he relies must be part of the contract itself (*Morris v. Bradley Fert. Co.*, 64 Fed. 55; *Grieb v. Cole*, 1 Amer. St. Rep. 533; *Warder v. Bowan*, 17 N. W. (Minn.) 943; *Torkelson v. Jorgenson*, 10 id. 416; *Richardson v. Grandy*, 49 Vt. 22; *Welshausen v. Parker Co.*, 76 Atl. (Conn.) 271; *Underwood v. Carr Co.*, 82 S. E. (N. C.) 855). And here, it may be observed, that not only was no printed matter identified as the particular printed matter referred to in the contract itself: not only does it fail to appear that the purchase of this mechanical milker was made in reliance upon the particular printed matter selected and read by counsel as in his opinion pertinent to this case (117): but also, no printed matter was attached to the contract, or made part of the contract in any recognizable manner, or identified in any way by the contract itself. And in this connection, we submit that it is important to bear in mind the distinction between a misrepresentation, if any, and a

warranty, if any: a representation is, as we understand it, an antecedent statement made as an inducement to the contract, but not a part of or an element in the contract itself, whereas, a warranty becomes by agreement a part of the contract itself; and the untruthfulness of a misrepresentation, unless material or fraudulent, will not affect the contract (compare *Benjamin Sales*, 6th Amer. Ed. Sec. 853; *Behm v. Burness*, 3 B. & S. 751; *Hopkins v. Tanqueray*, 15 C. B. 130; *Martin v. Shub*, 113 N. E. (Ind.) 384; *McCarty v. Williams*, id. 370.).

Moreover, and with particular reference to the very printed matter selected by counsel for the edification of the jury, it will help, we think, to determine the issues here if certain characteristics of that printed matter be referred to. We submit that this printed matter is at most a descriptive recital of the mechanical milker's mode of operation; and it cannot therefore be regarded as a warranty (*Sharp v. Sturgen*, 66 Mo. App. 191; *St. Anthony etc. Co. v. Princeton Co.*, 116 N. W. (Minn.) 935; *Heath etc. Co. v. Hurd*, 86 N. E. (N. Y.) 18; *Carlton Lombard*, 43 id. 422; *Selling Co. v. Cowin*, 133 N. W. (Iowa) 338; *Lumber Corp. v. McCaldin*, 135 N. Y. S. 627; *McClurg v. Tomlenson*, 186 Ill. App. 55; *Wasserstrom v. Cohen*, 150 N. Y. S. 638; *Brown v. Davidson*, 142 Pac. (Okl.) 387). And in the next place, this printed matter amounts, we submit, to nothing more than dealer's talk, and is not, therefore, of itself a warranty. The simple commendation of an article sold, or a general description of its character, value, quality, goodness, soundness, etc., or other

exaggerated statements or recommendations give rise to no warranty (*Titus v. Poole*, 40 N. E. (N. Y.) 228; *Schroeder v. Trubee*, 35 Fed. 652; *Tabor v. Peters*, 49 Amer. Rep. 804; *Brackett v. Martin*, 4 Cal. App. 249; *Mills Co. v. Moore*, 177 Fed. 744; *Iron Works v. Dock Co.*, 168 Cal. 81; *Alexander v. Stone*, 29 Cal. App. 488-489). It may, indeed, be said generally that representations expressive of the vendor's belief, opinion, judgment or estimate, do not constitute a warranty: no expression of opinion, however strong, imports a warranty (*Bryant v. Crosby*, 40 Maine 9; *Henshaw v. Robbins*, 43 Amer. Dec. 367; *Stainaker v. Janes*, 69 S. E. (W. Vir.) 651; *Carber-Shadbow Co. v. Loch*, 151 Pac. (Wash.) 787, 788; *Roberts v. Applegate*, 38 N. E. (Ill.) 676; *Enger Co. v. Dowley*, 19 Atl. (Vt.) 478).

Viewed in the light of these rules, and having regard to its own declarations, the scope of this printed matter selected by counsel—assuming it to have any real relevance whatsoever—is very limited, indeed. No claim is made in this printed matter that the output of milk would actually be increased. At page 115, the printed matter selected by counsel speaks of “a condition which *frequently* increases milk production”—not always, but “frequently” only, leaving an obvious margin for instances wherein the milk production is not increased. There is nothing absolute about this term “frequently”; and it by no means presupposes a condition of absolute and unbroken continuity: it is no more absolute than the word “capable”, for instance, in the contract of sale itself (114). And this may be illustrated by supposing that the company, defendant

in the issue, is offering only to show a capability of the mechanical milker of producing an effect: obviously, it would here be logically of no avail whatever to produce against the company instances in which the effect was not produced: such instances would not meet the point: because it is quite consistent with the capability of producing the effect that there should be instances in which the effect is not produced,—for example, if a party has evidenced by one or two instances the capability of a pistol to carry 200 yards, it is logically of no avail for his opponent to answer by negative instances where it is not carried thus far. Logically, nothing short of a universal negative would suffice. And in this connection, as showing that even this printed matter makes no claim that the output of milk would be increased, attention may be called to the statement on page 116 of the record that the milker “*improves* the flow of milk”—not that it increases it, but that it improves it; also to the statement on page 117, to the effect that the “Sharples milker has a “*tendency* to increase the production of milk”; and attention may be directed also to the advertence on page 117 to the “*probabilities*”. Something of this was evidently in the mind of the pleader who drafted the amended complaint, because, on pages 60 and 61 of the record, we find him, instead of complaining that the output of milk was not increased, merely alleging that the warranty was that the “amount of milk would not be decreased”; and upon this point, reference may further be had to the testimony of Mr. Skinner, near the bottom of page 118 of the record, where he states

that “we proceeded to milk the cows with the machine; “it took the milk away from the cows all right”; and also to his hesitating testimony on pages 162-3 of the record, dealing with the amount of milk given, wherein he confesses that “I have no way of estimating how “much less milk she (the cow) would give”.

And so far as any asserted claim of irritation of the teats of the cow is concerned, the whole case shows, we submit that assuming this condition it was traceable to the bad management and insanitary environment which were such marked characteristics of the Skinner dairy. And such conditions would bar a recovery upon the asserted warranty, even if we did import into it this unidentified printed matter (*Wingate v. Johnson*, 101 N. W. (Iowa) 751; *McKay v. Johnson*, 79 id. 390; *Swanson v. Allen*, id. 132; *Razey v. J. B. Colt Co.*, 94 N. Y. S. 595; *Leopold v. Van Kirk*, 27 Wis. 152; *Avery Planter Co. v. Rigg*, 56 Ill. App. 599; *Mack v. Sloteman*, 21 Fed. 109; *Road Roller Co. v. Coffman*, 72 S. E. (W. Vir.) 749; *Ellis v. Barclay*, 142 N. W. (Iowa) 203; *Belting Co. v. Mfg. Co.*, 100 N. E. (Ill.) 920; *Chapman v. Roggenkamp*, 182 Ill. App. 117; *McKinley v. Small*, 146 N. W. (Mich.) 230). Indeed, it may be said that improper use or mismanagement is a sufficient answer to a claim based upon an alleged warranty.

It is proper, moreover, we think, to call attention to the general rule that a warranty relates only to the time of sale and does not cover defects, if any, arising in the future (*English v. Spokane Com. Co.*, 57 Fed. 451), and that in the contract before the court in this controversy there is no warranty as to the action or

operation of the mechanical milker *in futuro*, the sole statement made being that the milker was "capable" of doing the work, not that it would so continue. And not only is a warranty limited to the time of the purchase itself, but, assuming the existence of a warranty in the cause at bar, it would be limited to the original three units (compare *Griggs v. Stone*, 7 L. R. A. 48; *Troy Laundry Co. v. Henry*, 31 Pac. Ore. 484; *Cyclone Co. v. Vulcan Iron Works*, 51 Fed. 920; *Hotel Co. v. Stoker Co.*, 178 Fed. 806), and cannot, we submit, be held to reach over and apply to a subsequent unit imported into the milker from a source foreign to or disconnected from the party sought to be charged under the asserted warranty. The burden of the testimony in this cause shows that the real trouble here arose upon or after the advent of the fourth unit, and that, after its delivery, this fourth unit was used indiscriminately upon the various animals: is a warranty, assuming one of the character asserted, unbroken until the advent of this alien unit, now to be appealed to to hold this company responsible for a condition much more readily traceable to the fourth unit than to the original three? We submit that such a result would be unjust.

It must, in addition, be steadily borne in mind that the sale of this milking machine was made subject to the conditions of sale, which conditions were quite as much a part of this contract as was this asserted warranty; and no acute accent may be put upon the alleged warranty so as to maximize it and minimize the "conditions of sale" without formulating a new contract for parties in whose minds the "Conditions of Sale"

and the "guarantee" were of at least equal importance and value. While, in point of fact, as the contract itself shows, "This sale is made with the understanding that " the purchaser will have the machine operated and " cared for in accordance with our instructions. This " is necessary for the profit and satisfaction of the " purchaser and for the protection of the manufacturer. " Special attention is called to the following points: " That the machine be kept in good order mechani- " cally.

"That the pressure and vacuum adjustment shall be " maintained in accordance with instructions.

"That the cows be carefully and thoroughly stripped " after each milking.

"That the machine be thoroughly cleaned after each " milking and that all reasonable precautions tending to " the production of clean milk be observed" (113-114), still, none of these conditions were complied with. Thus, the machine was not kept in good order mechanically: no other conclusion can be drawn from Skinner's testimony; and his testimony at page 129 as to the dirt which had gotten into the machine, and as to the new rubbers which became necessary, would of itself be sufficient to show his disregard for the mechanical good order of the machine. And so, likewise, with his failure to maintain the adjustment of the pressure and vacuum: his testimony as given at pages 146-7-8, and as illustrated by the testimony of his son on page 169, makes it quite clear that this condition of sale was honored much more in its breach than in its observance. No sort of showing is made that the machine was thorough-

ly cleaned after each milking; Mr. Skinner's testimony as to the dirt, on page 129, his admission on pages 149-50 that he never washed or cleaned the teat cups between one cow and another at any time, and that after he milked a cow he did not wash the teat cups before he put them on another cow, and his confession that the water used in connection with this milking machine was the bacteria-tainted water from the Colorado river, especially as these points are illustrated by the testimony of Reed, all concur in showing that this condition of sale was in no way intelligently complied with as required by the contract. And so, likewise, with the requirement that "all reasonable precautions tending to the production of clean milk be observed" (114). The violation, and the persistent violation, of this condition of sale is established here, not alone by Skinner's backward and unprogressive views as to sanitation and improved dairy conditions, not alone by his willingness to abide by the primitive methods of his fellow dairymen in Imperial Valley, but also by specific testimony as to the absence of any visit from a veterinarian prior to 1914 (150), and also as to the absence of any visit from any veterinarian upon Skinner's invitation during 1914 (152), and also as to the failure to have any competent person properly examine the milk drawn from his cows (160, 161), and also as to the absence of such improvements as a barn, a cement floor and proper stanchions (141-3), and also as to the cows walking about in the mud (155), and also as to the use by the cows of the irrigation ditches (154), and also as to the water used both for cows and utensils (152,

158, 179-181), and also as to the water or mud holes (235, 236), and also as to the general dirtiness of the place (238), and also as to the failure to isolate sick cows (167-171), and also as to other particulars which might well be enumerated: but sufficient, we think, is here stated to establish the utter and complete disregard of this most important condition of sale.

In view of these considerations, we are unable to understand how it can be said, bearing in mind the relevant rules of law and the disclosures of this record, that this evidence establishes any breach of any warranty for which the plaintiff below was entitled to recover. The very contract upon which he relied called for the performance of certain duties upon his part, and "special attention" was called by the contract itself to those very duties: the evidence discloses an utter disregard upon his part of the obligations resting upon himself: upon no principle of equity or right, can he be permitted to claim the benefit of the contract while disclaiming and disregarding the burden thereof; and since the evidence clearly establishes a persistent breach by him of the conditions of the contract, conditions vital to any recovery as for a breach of warranty, we respectfully insist that the evidence fails to disclose any such breach of warranty for which this defendant company can be held justly responsible.

ERRORS COMMITTED DURING THE COURSE OF THE TRIAL.

1. **It Was Error to Admit Unidentified and Disconnected Printed Matter Which Was Merely Part of the Preliminary Negotiations Leading Up to the Actual Transaction of Sale, Which Was Not in Itself Made a Part of the Actual Contract of Sale, and Which Was Not in Itself a Warranty.**

Assignments 8, 16-17, 18.

In the general statement of the case which has heretofore been made, the facts relative to the original appearance of this printed matter during the course of the preliminary negotiations have been referred to, and those observations need not be repeated here. That this printed matter was not itself made a part of the actual contract of sale, may be determined by inspection of the contract itself; and nowhere throughout the record have we been able to find a particle of evidence to establish that the printed matter offered and received in evidence by the court below was the same printed matter so vaguely referred to in the contract of sale itself.

This printed matter, which was, without proper identification, received and read in evidence in the court below, was, we submit, a prediction merely,—the expression of hopes, expectations and beliefs, but nothing more. We submit that Mr. Skinner had no right to believe, from anything contained in any of the documents, and particularly from anything contained in this printed matter, that the successful operation of the machine was dependent solely upon the materials and workmanship contained in it, because there were

a great many other factors entirely without and beyond the control of the machine itself which would necessarily influence its operation: such, for example, as the personal equation of the operator, the preservation of the machine in good mechanical order, the adjustment of pressure and vacuum in accordance with the instructions of the company, the careful and thorough stripping of each cow after each milking, the thorough cleaning of the machine after each milking, and/or the observing of all reasonable precautions tending to the production of clean milk. Many things, indeed, might be mentioned in this connection as matters quite beyond the control of the present plaintiff in error, but which nevertheless would be the most important considerations in the successful operation of the machine: in a word, there were too many collateral considerations entirely beyond the control of the machine itself to justify the court or jury below in treating the promissory statements of this printed matter as warranties. Obviously, a statement as to what a machine would do in the future, is simply a matter of opinion—purely conjectural, and not a warranty; and there is in this case no warranty as to the operation of this machine regardless of the surrounding circumstances, or regardless of due compliance with those “conditions of sale”, subject to which the machine was sold. The case which has been sought to be made here is not one of an established mechanical defect in the machine *qua* machine: no such proof was made; but the case here is one of the purchase of an article in respect to the operation of which, in producing a desired result under particular

circumstances, the buyer found himself disappointed—a disappointment which the evidence traces to conditions not in any way attributable to the machine itself. The statements contained in this printed matter were no more, we submit, than expressions of opinion, confessedly honestly entertained, and obviously dependent upon other elements than the machine itself—dependent upon actual and sincere compliance with the “conditions of sale”, concerning which Mr. Skinner himself could form an opinion as well as this plaintiff in error, or better.

2. It Was Error to Admit the Incompetent Conclusions of Witnesses Upon Matters Material to the Correct Decision of the Cause.

The rule that witnesses must state facts and not conclusions, is an elementary one: if there be a rule well established in the law of evidence, it is that a witness must be confined to a statement of facts, leaving the conclusion to be drawn from those facts to the jury. The function of the witness is to state what he actually observed, but it is no part of that function for the witness to formulate for the jury a conclusion upon the facts which he observed or to which he testified. It is clearly never the province of a witness to act as judge and jury—to invade the province of the jury, or to substitute his conclusion for that of the jury; and it is against recognized principles to address questions to a witness which were so framed as to call upon him to determine controverted issues of facts or to pass upon the effect of a series of facts. Thus, it would obviously be improper to ask a witness to

state his conclusion upon the testimony in a case relating to any given question: because, in such an instance, the witness is in effect asked to decide the merits of the case, which is a duty wholly beyond his province; and no rule of law authorizes the invasion by the witness of the province of the jury by drawing those conclusions of fact upon which the decision of the cause depends. It is for the jury alone to draw conclusions and inferences from the facts proved: it is not for a witness to arrogate to himself the function of a witness, jury or judge, or to invade the legitimate province of the real triers of the facts. In other words, there is no principle of the law of evidence with which we are familiar, which justifies the admissibility of the conclusions or impressions of the witness. Thus, as observed in the well considered case of *People v. Sharp*, 107 N. Y. 427,

“The opinion, the thought, the understanding of the witness, is not evidence”;

and this same idea has found expression in many decisions of respectable courts. Thus, that a meeting was “disturbed” is incompetent (*Morris v. State*, 94 Ala. 467); that a contract has been “abandoned” is incompetent (*R. R. v. Woodworth*, 8 So. (Fla.) 177); that goods were “accepted” is incompetent (*Brewer v. R. R.*, 107 Mass. 277); that possession was “adverse” is incompetent (*Arents v. R. R.*, 156 N. Y. 1); that an act was within an agent’s “authority” is incompetent (*Beninghoff v. Insurance Company*, 93 N. Y. 500; *Green v. R. R.*, 35 Amer. Rep. 370; *Rodgers v. Virginia Chemical Co.*, 149 Fed. 1); whether a party “assented” to a

settlement, is incompetent (*Stanton v. Cristoll*, 9 Hun. 502); to declare "merchandise entitled to debenture" is incompetent (*W H. Thomas & Son v. Barnett*, 135 Fed. 172); that a house was in "good repair" is incompetent (*McMann v. Dubuque*, 107 Iowa 62); whether one is a man of "financial ability", or "responsibility", or "solvency", or "insolvency", is incompetent (*Thompson v. Hall*, 45 Barb. 216; *Denman v. Campbell*, 7 Hun. 88; *York v. People*, 31 Hun. 446; *Hahn v. Penney*, 60 Minn. 487; *Agnew v. U. S.*, 165 U. S. 36); whether another had "knowledge" is incompetent (*Bailey v. State*, 107 Ala. 151; *McCouster v. Banks*, 84 Md. 292); that certain articles were "necessary" is incompetent (*Poock v. Miller*, 1 Hilt, 108; *Tolles v. Wood*, 99 N. Y. 616); whether one engine discharged more sparks than another is incompetent (*Collins v. R. R.*, 109 N. Y. 243); whether a person "has done as agreed" is incompetent (*Nichols v. White*, 41 Hun. 152; *Clark v. Ryan*, 95 Ala. 406); and see further in support of this principle:

Porter v. F. M. Davies & Co., 223 Fed. 465, 1022;

Largan v. R. R., 40 Cal. 272;

Tait v. Hall, 71 id. 149;

People v. Reed, 52 Pac. (Cal.) 835;

People v. Elliott, 119 Cal. 593;

Watrous v. Morrison, 33 Fla. 261;

State v. Porter, 52 Pac. 175;

Linihan v. State, 22 So. (Ala.) 662;

Raney v. State, 45 S. W. (Texas) 489;

Murray v. R. R., 52 Pac. (Utah) 596;

People v. Fogalson, 74 N. W. (Mich.) 730;

Tillery v. State, 24 Tex. App. 251;

Brinkley v. State, 89 Ala. 34.

Some illustrations of the disregard exhibited during the trial below for the principle to which we are appealing may here be briefly referred to. Thus, on page 120 of the record, Mr. Skinner was permitted, without any showing either of obligation on the part of the company, or that the facts testified to were within his knowledge, to state his conclusions as to asserted duties resting upon the defendant company: he was permitted to declare, referring to the company that "They was to send this demonstrator there once a month to go through my herd and see if everything was working all right"; and the effort on the part of the defendant company to have this objectionable matter removed from the record was denied by the learned judge of the court below. An inspection of the contract of sale, by which, if by anything, the rights of these parties are to be determined, fails to disclose any duty resting upon this company to send a demonstrator to make monthly visits to Mr. Skinner's herd: all that the contract called for was the installation of the machine: it called for nothing more: that installation was duly accomplished; and it is expressly provided in the contract that "all terms and agreements of this order appear hereon in writing" (113). Upon what principle, then, Mr. Skinner should be permitted to state his conclusions as to any duties upon the part of the defendant company, we are unable to understand: we submit that this new obligation of monthly

visitation by a demonstrator cannot, through the medium of a bald conclusion by Mr. Skinner, be imported into the relations between these parties without violating all rules; and we submit that this declaration of Mr. Skinner was objectionable and inadmissible because it was an attempt to vary and enlarge, by a parol conclusion of a witness, the actual terms of a specific written contract (Assignment 19).

Again (Assignments 23-24), the witness Skinner was permitted to testify to his conclusions as to "loss as "the result of the operation of this milker"; and his testimony in that regard will be found on pages 126-7 of the record. As part of his answer to the inquiry made on page 126, the witness, in actual terms, states, not facts from which a jury could draw its own inference or make up its own opinion, but his "opinion", saying, in that connection, that "if they had not used "this milker the cows would, in my opinion, have held "up",—a sheer conclusion going directly to the merits of the controversy, and a plain invasion of the province of the jury. This particular subject matter will be hereafter more fully discussed.

Another illustration of the disregard for this settled rule of evidence above adverted to, will be found in the testimony of Mr. Boarts, at page 259 of the record (Assignment 73).

The answer in the cause insisted in very specific terms upon the insanitary condition of Mr. Skinner's premises. While Mr. Skinner was a witness, he testified to a number of facts quite inconsistent with that degree of cleanliness and good sanitation which common ex-

perience expects in a milk dairy. And from other witnesses in the cause, information was obtained sometimes directly, sometimes indirectly, which emphasized the lack of sanitary precautions upon Mr. Skinner's part. This lack of sanitary precautions was, of course, a plain violation of the "conditions of sale" under which the milker in question was sold; and reference is made, in our general statement of the case, to some of the details illustrative of sanitary conditions upon Mr. Skinner's premises. This subject matter was, therefore, material in the cause, so much so, indeed, that Mr. Boarts was produced as a witness concerning conditions upon the Skinner premises. When examined, Mr. Boarts, instead of presenting the jury with the facts, and leaving the jury to draw its own conclusion, undertook to decide matters for the jury by declaring, *inter alia*, that Mr. Skinner "had a very "good dairy house". The defendant company promptly moved to strike out this answer as being a conclusion of the witness—as it undoubtedly was; but the learned judge below permitted the conclusion to remain in evidence and denied the application. In view of the importance which the sanitary conditions upon the Skinner premises had attained during the trial below, it is submitted that this ruling was particularly bad; and if, as was held in *McMann v. Dubuque*, 107 Iowa 62, testimony that a house was in "good repair" is incompetent, then we think that by analogy of reasoning, a declaration that "he had a very good dairy house" is equally incompetent. Mr. Boarts was a fellow dairyman of Mr. Skinner from Imperial

Valley; and we submit that no reasonable person can say that the jury below was not influenced by this conclusion of Mr. Boarts upon a matter which figured so largely in the sanitation of Mr. Skinner's premises.

Another illustration of which we complain, will be found in the testimony of Dr. Cram, on page 275 of the record (Assignment 75). Dr. Cram was a veterinarian who found a diseased condition of the udders of several of the cows about the last of June, 1914: he found pus in the teats of the cows, which he conceded indicated the presence of a germ. He conceded further that there were two or three kinds of germs, but declared that "I did not make any bacteriological test of "the germs from Skinner's cows". He then undertook to claim that while the presence of pus did indicate the presence of a germ, yet this germ was neither infectious or contagious; and in line with this position declared "I presumed it was "staphylococcus, I presume it was, my opinion is a presumption, and I made "no bacteriological or chemical analysis". The motion of the defendant company to eliminate this mere presumption on the part of this witness, was denied by the learned judge below. We submit that the motion should have been granted: that the declaration of this veterinarian was not only an empty conclusion predicated upon no substantial data, but it was even worse,—it was plain blind guess work.

Not to multiply illustrations, attention may be directed finally, to the testimony of Mr. McCulloch, included between pages 282 and 285, of the record, Assignments 77-81. Mr. McCulloch exhibited no such

peculiar knowledge as justified him in posing as an expert. He was another Imperial Valley dairyman; but it nowhere appears that he ever made a study of the causes or effects of mammitis. In addition to this, it does not appear that he was qualified to express expert opinions upon the subject of the operation of mechanical milkers. It appears that he himself operated a mechanical milker for two months: but beyond that, the only mechanical milker which he saw operated was one at Mr. Miller's place, one at the Hinman place and "D. L. K." There is no proof anywhere that these three (?) mechanical milkers which Mr. McCulloch saw operated, were properly operated. Over the objection of the defendant company Mr. McCulloch testified that he followed the instructions of the company in operating his milker: this, of course, was a sheer conclusion upon his part: but there is not even this to show how the other three mechanical milkers were themselves operated. Nor does it appear how much familiarity with the other mechanical milkers is implied in his statement, "I have seen operated"; nor does he attempt to state what results were obtained in the operation of the other milkers. In this stage of the evidence, we fail to see how Mr. McCulloch has qualified as an expert in milking machines to such an extent that he was entitled to make such wholesale statements of opinion as those which were admitted by the learned judge of the court below. We submit that this vice runs all through the testimony of Mr. McCulloch, and that various objections and motions of the defendant company, made in the effort to weed

out Mr. McCulloch's unwarranted conclusions should have been sustained by the lower court.

The cause at bar was a cause closely contested upon the facts and that, too, before a jury: under such circumstances, it is highly essential that the trial be had according to the established rules of evidence; and under these circumstances, we submit that this free indulgence in conclusions was much more prejudicial than if the cause had been heard before the court sitting without a jury. It is, we submit, impossible to say that the jury were not influenced by these unauthorized conclusions of the witnesses.

3. **The Lower Court Erred in Permitting the Acts, Conduct, Declarations and Agreements of Briggs to Be Laid Before the Jury, Notwithstanding That He Was Not Shown to Have Been Authorized to Bind Thereby the Defendant Company.**

Assignments 20, 21, 26-29-32.

Nothing, in our opinion, could well have been more prejudicial than the action of the learned judge in this behalf: it certainly could not have failed to have influenced the jury in a marked degree; and certainly no one, we think, can fairly say that it did not. The record here shows that up to the first mention of Mr. Briggs name, no proof whatever had been made either of any agency, or of the scope of any agency. Up to that time, the solitary witness had been Mr. Skinner himself: but Mr. Skinner knew nothing about Mr. Briggs: as Skinner puts it, "I had never seen him before" (122). Mr. Skinner then goes on to state what Mr. Briggs said:

but, as observed by the Circuit Court of Appeals for the Eighth Circuit, "The admissions and declarations " of an alleged agent are alike incompetent to establish " his authority or the extent of his powers" (*Walmsley v. Quigley*, 129 Fed. 583, 585; and see, also, to the same effect, *W. K. N. Coal Co. v. Piedmont, etc., Coal Company*, 136 id. 179; *In re Thomas*, 199 Fed. 214; *Chicago etc. Ry. v. Chickasha Nat. Bk.*, 174 id. 923; *West v. Grocery Company*, 138 N. C. 166; *People v. Dye*, 75 Cal. 108; *Peterson v. Stockton etc. Co.*, 134 id. 244; *Curry v. Syndicate*, 104 Ill. Apps. 165; *Osgood v. Pacey*, 23 id. 116; *French v. Wade*, 11 Pac. (Kas.) 138; *Fullerton v. McLaughlin*, 24 N. Y. S. 280; *Sier v. Bache*, 27 id. 255; *Larson v. Investment Co.*, 53 N. W. (Minn.) 179; *Salmon Falls Bank v. Leyser*, 22 S. W. (Mo.) 503); and nothing, therefore, we submit, that Mr. Briggs may have said to Mr. Skinner, could establish either an agency or its scope. Neither Mr. Skinner's son, nor his wife, throws any light upon the situation; and the plaintiff's case ended without any proof whatever of any agency on the part of Mr. Briggs, or as to the scope of any agency on his part.

Bearing this in mind, what was done by the learned court below? On pages 122-3 of the record, and over the objections of the defendant company, one of which specifically was that "Briggs had no authority to contract", the learned judge of the court below permitted proof to be made of the execution of a written agreement between Mr. Briggs purporting to act for the defendant company and Mr. Skinner; and this written agreement will be found set forth in full in the record

on page 293 thereof. Upon what theory these facts were admitted in evidence, we frankly cannot understand. If there had been any evidence to show that Mr. Briggs had been invested by the defendant company with authority to enter into binding written arrangements, one could understand this action by the lower court: but in the absence of that foundation, the ruling of the lower court is to our minds inexplicable. It having appeared that the writing was made and that, as Skinner remarked, "but for my receiving
" this written paper, I would not have allowed Reed
" to restart the machine" (123), thus arousing and exciting the curiosity of the jury as to the contents of that written paper, the written paper itself was offered in evidence. Thereupon, objections having been made to its admissibility, a ruling was reserved pending argument by counsel; and subsequently, as appears from page 127 of the record, the learned lower court ruled that "such purported agreement was not competent
" evidence in this case and sustained the objection made
" thereto by the defendant Sharples Separator Com-
" pany, a corporation". One would suppose that this would have ended the matter of this writing, that the ruling of the learned judge below would have been respected by all concerned, and that all future references to this unauthorized writing would have been stopped: one would have supposed that the learned judge below would have stopped the plaintiff from doing indirectly what he could not do directly; and one would have supposed that the learned judge below would have himself abstained from participating in any

references to a writing which had been ruled out by himself as incompetent evidence. But, what happened? Notwithstanding the absence of proof of any agency in Briggs, notwithstanding the absence of proof of any authority in him to bind the defendant company by contract, notwithstanding the ruling excluding from the jury knowledge of the contents of a writing which had so materially influenced Mr. Skinner (“but for my receiving this written paper, I would not have allowed Reed to restart the machine” 123 *ad finem*), yet the learned lower court permitted, against the objections and exceptions of this plaintiff in error, constant reference to this excluded agreement and to its existence, and to its importance and its effect upon Mr. Skinner; and these repeated references to this purported agreement were all the more prejudicial, because their veiled character left the jury to imagine what they pleased concerning it,—the jury knowing that a writing was made, knowing that this writing had seriously influenced Mr. Skinner’s action, knowing that Mr. Skinner wanted that writing exhibited to them, and knowing that the defendant company had stopped its exhibition by an objection, but not knowing the contents of the writing. Thus, while the actual text of this unauthorized Briggs writing was, properly, not allowed to go to the jury, yet the plaintiff was permitted to keep the fact that there was an agreement before the eyes of the jury and this to permit—if not to invite—the jury to draw any inference however broad, however favorable to Mr. Skinner, however prejudicial to the defendant company,

as to the origin of the agreement and/or as to its contents.

A sufficiently typical illustration of this procedure, emphasized by the affirmative action of the learned judge himself, may here be exhibited. Near the bottom of page 123, the plaintiff below was allowed to say, "but for my receiving this written paper, I would not have allowed Reed to restart the machine" (what had this plaintiff in error to do with the uncommunicated motives that actuated Skinner's personal conduct? *Wheless v. Rhodes*, 70 Ala. 419; *Stewart v. Whitlock*, 58 Cal. 2; *Burns v. Campbell*, 71 id. 271; *Woods v. Whitney*, 42 Cal. 358; *McCormack v. Joseph*, 77 Ala. 236; *Brown v. Hickey*, 68 Iowa 330; *McDonald v. Jacobs*, 77 Ala. 524; *Herring v. Skaggs*, 34 Amer. Rep. 4; *Williams v. State*, 26 So. (Ala.) 521); and at the top of page 129, he stated, speaking of the machine, that "Mr. Reed used it after Briggs came there". Thereupon, the learned judge below, notwithstanding the absence of any proof of Briggs agency, or of its scope, or of his authority to bind the company by contracts of any character, and notwithstanding his own ruling excluding the Briggs agreement, actually inquired of the witness, the plaintiff himself, "did you consent to its being used on your cows by reason of what Briggs induced you to do?"; and the witness, against objection, was permitted to answer in the affirmative. Than this question coming from the court itself, could have anything been more potent to convey to that jury by indirection what the court itself refused to allow to be conveyed directly? Could that jury

have failed to have been impressed by this action of the court with the gravity and potency of that agreement to which, notwithstanding its exclusion upon the defendant's objection, the court himself thus voluntarily returned? Nothing is more common, as every man experienced in the ways of juries will concede, than that mental habit whereby jurors attach ideas of potency to that which is unknown to them, and particularly to that which an objection prevents them from knowing,—a general trait, indeed, which is concentered in the familiar maxim, *Omne ignotum pro magnifico*. And why should the burden be put upon the defendant company of meeting the implications conveyed by this question from the bench and the responsive answer thereto from the witness? How, indeed, can it be said that this proceeding did not operate to the detriment of the defendant company, particularly, since it had its origin “from the high and authoritative position of a judge presiding at a trial before a jury” (*McMinn v. Wheelan*, 27 Cal. 319; *People v. Williams*, 17 id. 147-8; *Hair v. Little*, 28 Ala. 236; *People v. Conboy*, 15 Cal. App. 97)?

The same prejudicial utilization of forbidden and excluded material occurs on page 131 of the record. There, the following occurred:

“Mr. SWING. Q. With reference to the guarantee
 “ which he gave you, or purported to give you at the
 “ time you consented to restarting the milker, I will
 “ ask you if at any time since you have ever received
 “ any notice or intimation from the company that that
 “ was not a valid contract or guarantee?

“Mr. PARKE. We object to the form of the question
 “—that a guarantee was given by Briggs; and if that
 “alleged contract was not binding upon the company,
 “it would not make any difference whether they ever
 “repudiated it or not, if there was no consideration
 “therefor.

“Said objection was then and there overruled by said
 “court, to which ruling said defendant, Sharples Sep-
 “arator Company, a corporation, then and there duly
 “excepted, and now assigns said ruling as error.

“Exception Number 12.

“The WITNESS. They did notify me.

“The COURT. Did they ever notify you that Briggs
 “was not their agent and had no authority to do what
 “he did do?

“Exception Number 13.

“The WITNESS. No, sir.

“Mr. PARKE. We move to strike out the answer of
 “the witness.

“Said motion to strike out was then and there denied
 “by said court, to which ruling said defendant, Sharples
 “Separator Company, a corporation, then and there
 “duly excepted, and now assigns said ruling as error.”

One seeks in vain for some relevant purpose in coun-
 sel's question. It may possibly have been a misguided
 attempt to establish a ratification of the Briggs agree-
 ment by the company. It certainly amounts to an ad-
 mission that Briggs was originally without authority
 to contract and that his act required ratification: but
 the circumstance sought to be elicited by the question

would obviously be insufficient to establish any ratification. In substance, the witness was asked whether the company notified him that the Briggs' guarantee was not a valid contract and the witness replied, "they did notify me". If by this the witness means that the company notified him that the Briggs guarantee was not a valid contract, then, instead of a ratification, we have a repudiation; and, of course, if there were no evidence that the company knew the existence of the Briggs contract, its failure to notify Mr. Skinner that the contract was not valid would not be evidence to establish its approval of the contract—one does not ratify that of which one is ignorant. And this criticism is applicable also to the question of the court. In that question, the unfortunate assumption is made that Briggs had assumed to act as agent for the company, and apparently a ratification of his conduct is sought to be deduced from something which the company did *not* do. The mere fact that the company did not notify Mr. Skinner that Mr. Briggs was not their agent and had no authority to do what he did do, is not only wholly insufficient to resurrect the contract, but it is further without efficacy because unaccompanied by proof that the company did know what Briggs did do; and plainly, neither court nor counsel below considered this to be any recognition or ratification of the contract, for the obvious reason that no attempt was made to re-offer the contract in evidence. It may be, however, that, in view of the posture of the case upon this point, counsel felt satisfied that the indirect references to this

contract were sufficiently favorable to the plaintiff below to influence the jury in his behalf.

Another illustration of this indirect user of prohibited material may be found on page 172. There, the following occurred:

“Mr. Skinner did not want to start the machine,
“and I was very bitterly opposed to it, but he finally
“started it under that written paper.

“Mr. SWING. Q. Was it started before or after
“that written paper was signed by Mr. Briggs?

“Mr. PARKE. We object to that. There is no evi-
“dence of a written contract of any kind.

“The COURT. Objection overruled.

“Mr. PARKE. Note an exception.

“Exception Number 16.

“And said defendant, Sharples Separator Company,
“a corporation, now assigns said ruling as error.

“The WITNESS. After.” (172)

Plainly, defendant’s counsel was right: there was no more evidence of any “written paper signed by Mr. Briggs” than there was of any authority upon the part of Mr. Briggs to bind the company by signing any written paper; and in view of the action of the lower court, in excluding the written paper, it was entirely wrong to predicate any question upon the existence of or signature to such written paper. Nevertheless, the question asked and the answer given presupposed the very written paper that the court had excluded, and left the jury free to indulge in the wildest imaginings as to its contents.

During all this there was, as already observed, no evidence whatever establishing either any agency in Briggs, or any authority in Briggs as an agent to bind the defendant company by contracts which he might choose to make. When Briggs himself came upon the stand later in the cause, no inquiry was made from him by the plaintiff as to the nature of his duties or the scope of his employment; and the testimony of Mr. Frank quite fails to further the contention of the plaintiff. Mr. Frank says:

“I know F. L. Briggs. He was in the employ of the
 “ Sharples Separator Company. I could not give the
 “ period of time. He was there during 1914. He was
 “ there when I went with the company and he was still
 “ there with the company when I left. His position
 “ was *milking machine expert*. His duties were to look
 “ after the *milking machines*, their *installation and*
 “ *troubles* which customers occasionally have and see
 “ that *that particular line of work* was carried on
 “ properly, and to instruct the dealers and agents in
 “ *the proper use of the machine*. He received instruc-
 “ tions from me and worked under my supervision”

* * * “I instructed F. L. Briggs to go to the ranch
 “ of W. W. Skinner, at El Centro, in 1914. Skinner was
 “ complaining that he thought his milker was not
 “ operating properly, and in accordance with our usual
 “ custom I sent Briggs there to see if he could not be
 “ satisfied, or rather, I sent Briggs there to see if he
 “ could not overcome his difficulty. I do not remember
 “ exactly what instructions were given to Briggs, but
 “ simply wrote or told Briggs personally to follow out

“ his usual custom or usual practice in attempting to
 “ satisfy customers or to correct any faulty installa-
 “ tion and find out what was wrong and straighten out
 “ the trouble” (252-253). Not only did all of this come
 out after the damage had already been done to the
 defendant below, but this testimony in itself wholly
 fails to show that Mr. Briggs was either a commercial
 agent of the company, or that he was authorized in
 any way to bind the company by contract, or that he
 had any duty to perform other than the purely me-
 chanical duties incident to the installation and opera-
 tion of the machines. It nowhere appears that Mr.
 Briggs was invested by the defendant company even
 with authority to sell machines; and therefore under
 Section 2323 of the California Civil Code, he would
 be without authority to warrant the title of his principal
 or the quality or quantity of the property sold.

When all of the evidence relating to Mr. Briggs and
 his activities is collated, it demonstrates that Mr.
 Briggs was merely a mechanical employee of the com-
 pany; that his duties were limited to the demonstration
 and operation of the milking machines; and that his
 activity was limited to the operation of the milker with
 mechanical propriety. He dealt, not with commercial
 or business transactions, but with matters of manual or
 mechanical execution (*Kingnan & Co. v. Silvers*, 37
 N. E. (Ind.) 413, 416): he was sent to Mr.
 Skinner’s premises to inspect the machine and to put it
 into proper mechanical operation: he was not sent
 there to enter into contracts that would bind the
 company: it was not his business to enter into engage-

ments which the company had not authorized or of which it had no knowledge: Skinner “had never seen “ him before” (122): “When Mr. Briggs came on the “ scene, I never knew about his coming; I did not know “ how he came or when he was coming, until he got “ there” (162); and the mere fact that Mr. Briggs assumed to enter into a contract with Mr. Skinner did not justify Mr. Skinner in assuming that Mr. Briggs was “authorized to do what he did do” (131), without any inquiry whatever. It is remarked in *Walmsley v. Quigley*, 129 Fed. 583, where a trustee holding the legal title to land purported to be authorized to bind the *cestui* to pay the plaintiff a commission, if plaintiff could obtain a purchaser for the land, that:

“Proof of the authority of Morrison to make this agreement on behalf of Walmsley was clearly an indispensable prerequisite to the competency of evidence of the agreement * * * The admissions or declarations of an alleged agent are alike incompetent to establish his authority or the extent of his powers.

The Circuit Court should have sustained the objection to evidence of the agreement to pay the commission until the plaintiff had established the fact by competent proof that Walmsley had authorized Morrison to make such a contract on his behalf * * * A careful perusal of the entire record had produced a settled conviction in our minds that there was no evidence at any time during the trial that the defendant ever gave Morrison such authority or that he ever ratified any such contract. The result is that proof of the agreement of Walmsley to pay the commission was not only incompetent at the time it was offered, but it never became competent at any time during the trial of the action and the error in receiving it was crucial and fatal to the plaintiff's recovery, so that it becomes unnecessary to consider any other question presented in this case.”

So, in *Chicago etc. Ry. v. National Bank*, 86 Fed. 742, where a general agent to buy cotton made contracts with a bank borrowing money for his principal, etc., it was held that such contracts were not within the scope of his authority, and the court there used the following suggestive language:

“The bank did not, as it might have done for its protection, first learn the full extent of the power possessed by Carter from his principal * * * but on the contrary, assumed to engage in the business without any investigation, and in reliance on appearances and the word of the agent * * *”

And again, in *U. S. Bedding Co. v. Andre*, 150 S. W. (Ark.) 413, where it was held that a traveling salesman cannot bind his principal by contract for advertising his goods, the court said:

“A person dealing with an agent is at once put upon notice of the limitations of his authority, and must ascertain what that authority is. Such person cannot presume that such authority exists, he cannot rely upon the representations of the agent as to what that authority is; he must make inquiry and use due diligence to learn the nature and extent of such authority. If he does not, he deals with the agent at his own risk, and if the authority of the agent is disputed it devolves upon him to prove it.”

And so, likewise, in *Brager v. Levy*, 90 Atl. (Md.) 102, the court in holding that the burden rested upon the plaintiff to establish the existence and the scope of the asserted agency, makes the remark that

“they dealt with him as the agent of the defendant for the first time, without making any inquiry as to the extent of his authority”,

a remark which reminds us that on page 122 of our record, Mr. Skinner tells us that “Mr. Briggs appeared “ on the scene one day and told me he had come down “ to straighten up the milking machine business with “ me. I had never seen him before”; and on page 162, Mr. Skinner tells us that “Mr. Briggs came upon the “ scene, I never knew about his coming; I did not know “ how he came, or when he was coming until he got “ there”. And here it may be added that the views which we are endeavoring to impress upon this court are fully sustained by the California, among other, authorities:

“The ground upon which the respondent relies in support of the findings is that, in the negotiations between the plaintiff’s father and Munroe for the exchange of the properties, Munroe was the agent of the defendant for that purpose, and that the defendant is bound by all of the acts and representations of Munroe as his agent. There is, however, no evidence in the record tending to establish the fact of such agency, or that Munroe had any authority from the defendant, except the testimony of the plaintiff’s father that Munroe stated to him that he was such agent; and the rule is of long standing that the declarations of a person claiming to be the agent of another are insufficient to establish such agency or the terms of his authority. (Civ. Code, sec. 2319 (2); *Sav. etc. Soc. v. Gerichten*, 64 Cal. 520, (2 Pac. 405); *Smith v. Liverpool etc. Ins. Co.* 107 Cal. 432, (40 Pac. 540). On the other hand, the defendant testified that Munroe was not his agent, and that he had never employed or authorized him to act as his agent for the sale of any property; that he never had any dealings with anyone in connection with the Oakland property, or any conversation with anyone about its purchase or sale, or the payment of any encumbrance thereon, and had never had in his possession any paper or instrument referring to it, or known anything about the property

until the commencement of this suit, and Munroe himself testified that he had never acted as the agent of the defendant, and did not act as his agent in the transaction of December, 1899, and did not at that time state to the plaintiff's father that he was his agent. One who deals with another, upon his mere statement that he is the agent of a third person, takes upon himself the risk of being able to show that such agency existed (*McDonald v. Cool*, 134 Cal. 502, (66 Pac. 727)). If, instead of satisfying himself thereof by independent investigation, he accepts such statement and is deceived, he is the victim of his own credulity. The testimony of these declarations was inadmissible for the purpose of proving such agency and should have been excluded by the court upon the defendant's objection thereto, and when received should not have been considered."

Pease v. Fink, 3 Cal. App. 371, 379, 380.

A two cent stamp, a fifty cent telegram, or a one dollar telephone message, from Skinner to Frank at San Francisco, would have settled, easily and promptly, the character of the Briggs' agency, and the scope of his authority: but against inert unprogressiveness even the gods themselves fight unvictorious.

The learned judge of the court below must, himself, have appreciated Mr. Briggs' lack of authority to bind the defendant company: this is evidenced by his ruling excluding what for brevity we call the "Briggs' Contract": but that does not cure the harm done by permitting that to be done indirectly which could not have been done directly; and the action of the learned judge in permitting repeated references to this unauthorized Briggs' Contract, after having held it inadmissible, was particularly prejudicial to the defendant below and deprived it of that fair trial according to law to which it was entitled.

4. The Court Erred in Permitting the Ex Post Facto Opinions of Reed, an Unauthorized Person, to Be Laid Before the Jury, Although Such Opinions Concerned Past Events, and Were Not Within the Scope of Any Authority Possessed by Him.

Assignments 30-31, 41, 71.

The objectionable matter here complained of is exhibited in the following transcript from the record:

“Mr. SWING. Q. At the time Albert J. Reed quit, “ if he did, on December 20, state what, if anything, he “ said at the time he quit.

“A. When Mr. Reed quit?

“Q. Yes.

“Mr. PARKE. We object to that as incompetent, irrelevant and immaterial; and there is no evidence before “ this court of any kind, nature or description that “ Reed was agent of the Sharples Separator Company.

“Said objection was then and there overruled by said “ court, to which ruling said defendant Sharples Separator Company, a corporation, then and there duly “ excepted, and now assigns said ruling as error.

“Exception Number 14-A.

“The WITNESS. A. The first intimation that I had “ that Mr. Reed was going to quit, I walked into the “ corral and there was one of the cows showed that “ she was not feeling good, and I was in a hurry and “ was going to the ranch, and I said, ‘Mr. Reed, is that “ ‘cow sick?’ He said, ‘Look at her bag’. And I just “ stopped, and it was a heifer and the bag was all “ swollen up, and I didn’t say a word, and Mr. Reed “ didn’t for half a minute, and then Mr. Reed said,

“ ‘Skinner, I am going to quit; I have ruined the last
 “ ‘cow with this machine that I expect to ruin’. He
 “ quit, and I took him to town, and after he got to
 “ town the first thing he did he went in and talked to
 “ Mr. Edgar. He made in my presence a statement to
 “ Mr. Edgar regarding his ability or inability to run
 “ the machine.

“The WITNESS (continuing). Reed quit. After he
 “ went in town, he sent Mr. Frank a telegram. I saw
 “ the telegram written; it was written by Mr. Reed.

“Q. Do you know his handwriting; are you able to
 “ identify that (handing paper to the witness)?

“A. It is very much like it. I believe it is.

“Mr. SWING. We offer now in evidence the copy
 “ written by Reed which is attached to this deposition
 “ in which Reed testified in his handwriting, and which
 “ he wrote, and also the original furnished by the com-
 “ pany, which is word for word like this. I offer the
 “ two.

“Mr. PARKE. We object to that as incompetent, irrel-
 “ evant and immaterial; and further that no evidence
 “ is before the court that Reed was agent for the
 “ Sharples Separator Company, or any other employee
 “ at this time.

“Said objection was then and there overruled, by
 “ said court, to which said ruling said defendant
 “ Sharples Separator Company, a corporation, then and
 “ there duly excepted and now assigns the same as
 “ error.

“Exception Number 15.

“Mr. SWING. I wil read this to the jury:

“ ‘Dated El Centro, California, December 18, 1914.’

“ (Reading:) ‘Sharples Separator Co., 420 Mission

“ ‘Street, San Francisco. Have done everything possi-

“ ‘ble. Serious trouble started again. Taking too big

“ ‘risk to continue use of machine. We have dis-

“ ‘cussed every possible phase of situation, but quit

“ ‘milking, safest way, or we will have too big a loss,

“ ‘according to our agreement. Will await instruc-

“ ‘tions here. Wire at once. Albert J. Reed.’

“ ‘Said telegram was then and there marked by the
“ clerk as Plaintiff’s Exhibit 5.’”

The disclosures of the record, from the beginning, place Mr. Reed within the same general category as Mr. Briggs, and wholly fail to show that he was either an agent of the company, or such an agent that his declarations could bind the company. Like Mr. Briggs, he was at most merely an employee whose duties were mechanical—limited to the installation and operation of the machines: it nowhere appears that he had authority to sell or warrant: it nowhere appears that he was invested with any commercial, as opposed to mechanical, authority; and it was no part of his business to proclaim his personal *ex post facto* or other opinions about any or every matter that might have come under his observation.

On page 118, Skinner tells us that “the Sharples
“ people sent Mr. Reed to install the machine” and that he did so: clearly, Skinner did not consider Reed as appearing on the scene in any other than a mechanical capacity; and although, in stating that the Sharples

people sent Mr. Reed, Mr. Skinner was stating, not a fact within his knowledge, but a nude conclusion, yet the drapery with which he sought to clothe that conclusion, was the drapery of mechanics, but nothing more. And so throughout the Skinner testimony, we find Reed associated solely with the machine and its operation, but invested with no superior authority: on page 119, Reed tells Skinner about the *modus operandi* of obtaining and attaching another unit to the machine: on page 121, upon his return in June, Reed “proceeded to take charge of the milking machine”: on page 128, upon his return in October, Reed “did all the using (of the machine): he did everything to it: I never touched it. * * * Reed came and took charge of the machine” (129). * * * “Mr. Reed had absolute control of it; I had nothing to do with it at all” (129-130); and at page 133, we are told that, upon the memorable occasion when Reed “quit”, “he made in my presence a statement to Mr. Edgar regarding his ability or inability to run the machine”. Mr. Skinner did no “trading” with Mr. Reed: as Skinner says, on page 136, “I did not trade with Mr. Reed: I did not consider Mr. Reed in it at all”: on page 145 Mr. Skinner tells us that “Mr. Reed instructed me and my son and the young man that worked for me named Allen, as to the manner in which the machine should be operated when he first installed it”; and on page 149, we learn that “after I found that my cows had caked bags, I did not use this machine upon them, only at Mr. Reed’s directions”. The remainder of the testimony in

the cause is, so far as concerns the scope of Reed's activity, upon the same lines: nothing could be clearer upon this point than Reed's own deposition, taken at Skinner's instance; nowhere does Reed pretend to claim that he was a commercial or business agent of the defendant company; and nowhere throughout the case can be found any proof that Reed was anything more than a mere mechanical employee "working" (247) for defendant, within the scope of whose employment was not embraced any authority to make contracts, declarations or representations binding upon the company. In a word, Reed was no higher in rank in the company than Briggs: Reed neither possessed nor exercised any authority superior to that of Briggs: no distinction to the advantage of Reed is possible as between him and Briggs: any ruling of the lower court good as to Briggs would be equally good as to Reed; and if the contracts, declarations or representations of Briggs were properly excluded because of lack of authority in Briggs, then, by a parity of reason, similar activities by Reed should have been similarly excluded. Upon what principle any distinction could have been drawn by the learned judge between Briggs and Reed, we must confess our inability to understand: upon what principle Reed's declarations are admissible, but those of Briggs inadmissible, we cannot fathom: neither was more than a mechanical employee wholly unauthorized to bind the company in any way; and if the ruling excluding the Briggs agreement was sound, as it plainly was, its philosophy should have excluded, not only the repeated permitted and encouraged refer-

ences to the excluded material, of which we have complained, but also declarations of Reed that were prejudicial to the defendant below in the ultimate degree.

There is no testimony in this cause to show that from October 20th to the end of the year, Reed was anything more than a mere mechanical employe of the company; and, in special reference to the point under discussion, there is nothing to show that, included within the scope of this employment, was any authority to bind the company by any declaration, contract or representation. Reed himself makes no claim of this sort; he states that from October 20th to December 20th, he was at the Skinner premises “*to take charge of the mechanical milker. I was working at that time for the Sharples Separator Company. While there on the Skinner ranch at that time, I operated the milker*” (246-7); and Reed makes no pretence that at any time his “working” had any other scope than this mechanical one. And even so far as his claim of “working” for the company is concerned, he is contradicted by Mr. Frank, the sales manager, who states: “I know Albert J. Reed. He was with the Sharples Separator Company as *a milking machine expert* for a period of about nine months, and his employment ended with us prior to October, 1914. I think he had not been working for us for two or three weeks prior to October 20, 1914; his account had been squared up and been checked out. *Mr. Reed was engaged to install milking machines and to instruct the purchasers of the same in their proper use.* He worked under the direc-

“ tion of the San Francisco office. He might have
“ been working for us some time in October, but was
“ not working for us on October 20, 1914, or there-
“ after; I could not say how long before October 20.
“ My best judgment is that he was not working for
“ us for two or three weeks before the 20th of October,
“ 1914. I do not know whether or not Reed went
“ to the ranch of W. W. Skinner during the month of
“ October, 1914. Mr. Reed left the San Francisco
“ office, and it is my belief that he left for the W. W.
“ Skinner ranch. He came in to call upon me before
“ he went to the ranch of W. W. Skinner. I advised
“ Mr. Reed that if he would call upon Mr. W. W.
“ Skinner he could undoubtedly secure employment with
“ him as a *milking machine operator*; at that time
“ Mr. Reed was not in the employ of the Sharples
“ Separator Company. At the time when Mr. Reed
“ was at the ranch of W. W. Skinner in October,
“ November and December, 1914, I do not know in
“ whose employ he was; he was not in the employ
“ of the Sharples Separator Company. I didn't send
“ Reed to the ranch of W. W. Skinner, as an employee
“ of the Sharpless Separator Company. On October 20,
“ 1914, when Reed went to the place of W. W. Skinner
“ at El Centro, Reed was no longer in the employ
“ of the Sharples Separator Company, and I gave him
“ no instructions as to what his future work would be,
“ but suggested to him that if he was looking for
“ employment he could possibly obtain it from W. W.
“ Skinner. I did not give him any instructions to go
“ back to the Skinner place and restart the milking
“ machine and endeavor to get it running right, because

“ he was not in the employ of the Sharples Separator “Company” (253-4). And so, with Skinner himself: speaking of the period in question, Skinner broadly admits that “I do not know who selected Reed to “*operate that machine*” (131-2)—a piece of testimony which, in addition to its other characteristics, exhibits Skinner’s own understanding that the function of Reed was the mechanical one of “operating that machine”. Skinner then goes on to say: “Mr. Briggs asked me “when he wanted to send a man if I had any preference as to whom he sent. I told him I did not; I “said ‘You will do’. He said, ‘I can’t do it, I am “‘too high priced a man; the company would not “‘leave me here anyhow; I have no time; how will “‘Reed do?’ I said, ‘Reed will do all right; you can “‘send anybody you want. It is up to you people, “‘the Sharples Separator Company’ ” (132). But there is nothing here to establish that Reed was such an agent of the company that the company should fairly be bound by any of his deliverances, or to establish that he was anything more than a mechanician. As we have seen, Briggs was not authorized to bind the company by his contracts, representations or declarations, and so the learned judge below held: no declaration of Briggs to Skinner, then, whether in this conversation or otherwise, could bind the company; and it was not within the scope of the employment of either Briggs or Reed to do so. And in the next place, there is nothing in this conversation which Skinner undertakes to repeat with such extraordinary accuracy, which

indicates any purpose upon Briggs' part to send to Skinner even a company machinist: Briggs went no farther than to ask Skinner how Reed would do: but Skinner nowhere asserts that Reed was sent, or considered by himself, Skinner, even as the company's machinist, the position taken by Skinner being that "I do not know who selected Reed to operate that "machine" (131-2). And moreover, the fact that Reed was in communication with Frank falls entirely short of establishing Reed to be such an agent of the company that the latter should be bound by his declarations, written or oral contractual or otherwise. It was Reed's business, whether as Skinner's employee (256-7), or as a mechanic dealing with this make of mechanical milker, to keep in communication with the company that made the milker: the circumstance that Reed was at one time an employee of the company does not mean that his correspondence with Frank re-created that relation; and manifestly, the fact that Briggs—himself without authority to bind the company—suggested Reed's name to Skinner, cannot saddle this company with an agent authorized to bind the company by his declarations, particularly when this individual, as the sales manager's testimony shows (253), had not, even as a machinist, been working for the company for two or three weeks prior to October 20, 1914. We have, then, clearly, the right to invoke the rule, as against Reed, that before proof can be made of his representations, statements or admissions, it is essential that the fact that he was an agent at

the time of making them shall either be admitted or be shown in evidence by making a *prima facie* case.

California Code Civil Procedure, Sec. 1870,
Subd. 5;

Mechem, Agency, Sec. 1774;

Union Const. Co. v. W. U. Tel. Co., 163 Cal. 298;

Smith v. Liverpool Ins. Co. 107 id. 432, 437;

Bender-Martin Co. v. Apollo Co., 101 N. Y. S. 75.

But even upon the hypothesis that Reed was an agent of the company upon and subsequent to October 20, 1914,—that he was something more than a mere mechanic employed to install machines,—the case of the plaintiff below could not prosper, and the action of the court in receiving Reed's declarations would still be prejudicially erroneous; and this, for the plain reason that this very objectionable, incompetent and injurious declaration itself, as made by Reed, shows upon its face that it was made when the assumed agency came to an end. Skinner had been testifying about the correspondence between Reed and Frank, when the following significant question was put to him,

“Mr. SWING. Q. At the time Albert J. Reed quit, “if he did, on December 20, state what, if anything, “he said at the time he quit.

“A. When Mr. Reed quit?

“Q. Yes” (132).

This very question presupposed an occurrence “at “the time he quit”, which the examiner desired stated, and this view is substantiated by Skinner's testimony to the effect that Reed announced “ ‘Skinner, I am going “ ‘to quit; I have ruined the last cow with this machine

“ ‘that I expect to ruin’. He quit, and I took him to “town” (133). Even then, if we assume Reed to have been an actual agent of the company, and even if we further assume that his agency was such that the company would be bound by his declarations, still, are his declarations, made after his announcement that the connection is severed—that the assumed agency in the particular matter was at an end,—to be received to bind this company? Will this court allow an employe, who finds that he cannot do the work given him to do, to make admissions of the most injurious character when announcing that he is “quitting”? If Reed ever was an agent of the company authorized to bind it by his contracts, representations, admissions or declarations—which we deny—still, it is clear from the objectionable question itself, and from the reply of Skinner thereto, that the incompetent declarations were made when the assumed agency came to an end; and while it seems almost pedantic to cite authority for the proposition that the declarations of a former agent, made when the agency came to an end, are wholly incompetent and inadmissible against the former principal, yet the following may be consulted:

Vicksburg Ry. v. O'Brien, 119 U. S. 99;

Kenah v. The John Markee, 3 Fed. 45;

Mararae v. T. P. Ry., 124 id. 45;

Walker Mfg. Co. v. Knox, 136 id. 335;

Woolsey v. Haines, 165 Fed. 391;

Birch v. Hale, 99 Cal. 300;

Lissak v. Crocker Estate Co., 119 id. 442;

Boone v. Oakland Transit Co., 139 id. 492;

Luman v. Golden Co., 140 Cal. 709;
Haven v. Brown, 22 A. D. 208;
Hallheimer v. Brinckerhoff, 21 id. 155;
City Bank v. Bateman, 7 Harr. & J. (Md.) 104;
Parker v. Green, 8 Metc. 102; 11 Q. B. 46;
Waldeck & Co. v. P. C. S. S. Co., 2 Cal. App.
 167, 169.

In *Birch v. Hale*, supra, the Supreme Court said:

“The admission or declaration of an agent binds his principal ‘only when it is made during the continuance of the agency in regard to a transaction then depending *et dum fervet opus*. It is because it is a verbal act and part of the *res gestae* that it is admissible at all’. (Greenleaf on Evid., sec. 113.) ‘An agent is empowered to act for the principal, but has no power to make admissions to bind him unless these admissions constitute a part of the *res gestae*’. (Garfield v. Knight’s etc. W. Co., 14 Cal. 36.) ‘The admissions of an agent, not connected with the transaction to which they refer, cannot bind his principal even though made in explanation of an act previously done by him while in the exercise of his agency * * *. The declarations of an agent or servant do not in general bind the principal. To be admissible * * * they must be made, not only during the continuance of the agency, but in regard to a transaction depending at the very time’. (Beasley v. San Jose F. P. Co., 92 Cal. 388.)

It does not appear that the architect was still the agent of appellant when the admission sought to be proved was made, if made at all, nor does it appear that it related to a transaction then depending and was thus a part of the *res gestae*. On the contrary, the question plainly implied that it related to a past transaction. This being so, the objection should have been sustained and the evidence excluded.”

Birch v. Hale, 99 Cal. 300.

In *Lissack v. Crocker Estate Co.*, supra, which was a case involving an elevator accident, a witness on behalf of the plaintiff was permitted, against the objection of the defendant to give a conversation which he had had with the man in charge of the elevator, and the Supreme Court pointed out that:

“This conversation was had after the elevator had stopped in its fall, and after the plaintiff had been taken out of the cage, and formed no part of the *res gestae* and should have been excluded. It was only a statement of what had occurred and the defendant was not bound thereby. * * * It cannot be said that this was an immaterial error”.

Lissak v. Crocker Estate Co., 119 id. 444.

Again, by *Boone v. Oakland Transit Co.*, the double viciousness of the error now complained of, may be illustrated. There, the Supreme Court said:

“Over the objection of the defendant, a witness was allowed to testify that when the car stopped after the accident, and after the conductor had gone from the place where it stopped to the place where the plaintiff lay, and again returned to the car, the witness had a conversation with him, in which he said: ‘These ladies seem to blame me—seem to think it is my fault’. This was not a part of the *res gestae*. It happened after the accident, and after a sufficient time had elapsed for the defendant to walk almost half a block and back again. It was not even a relation of the facts which caused the accident, but was a mere statement of the opinion of third persons as to who was at fault. Its admission was against all the rules with relation to *res gestae*. Nor can it be said that the testimony was not injurious. Its effect was to get before the jury the opinions of the persons who saw the accident that the cause was the fault of the conductor,—that is, that it was due to his neglect. Such opinions, expressed at the time, are likely

to have great weight with a jury. There can be no question that the opinion of a witness who saw the accident, whether or not it was caused by the negligence of the defendant, would not be admissible, and would be injurious if allowed. With much more reason can it be said that hearsay statements as to the opinions of third persons, not placed upon the witness-stand, and not subject to cross-examination, are both inadmissible and injurious, if directed to a material point in the case.”

Boone v. Oakland Transit Co., 139 Cal. 490, 493.

And finally, not to multiply quotations upon this point, attention may be directed to *Luman v. Golden Ancient Channel Min. Co.*, supra, where the following statement of the law was made by the Supreme Court:

“It appeared that the plaintiff was brought out of the shaft several minutes after the occurrence of the accident. It having been shown that Haskins, the superintendent, was present at the time, the plaintiff was asked: ‘Did you make an inquiry of Mr. Smith at the time in regard to what caused the accident, and, if so, state what your inquiry was, and what was his reply?’ This was objected to upon the ground that the declaration of Smith could not bind the corporation, and the objection was sustained. The plaintiff then offered to prove, for the purpose of rebutting the evidence as to negligence of the fellow-servant, ‘that about ten minutes after the occurrence, and as soon as he reached the top of the shaft, he asked the brakeman, ‘How did it happen?’ The brakeman said in the presence of Mr. Haskins that ‘The clutch flew out, the machinery gave way,’ and that the brake would not hold it. Mr. Haskins replied, ‘Yes, because I saw him put the clutch in place, throw the clutch in place.’ This was objected to as irrelevant, immaterial, and incompetent, and the objection was sustained. Haskins was the superintendent of the mine, in charge of the works. It is not claimed that this testimony was offered for the purpose of impeaching the wit-

ness Haskins, and no foundation was laid for any impeachment. It was explicitly stated that the object was to rebut the testimony of negligence of the fellow-servant. The objections were properly sustained. Any declarations which might have been then made by either Smith or Haskins constituted no part of the *res gestae*. Haskins, the superintendent of the mine, had no more power to bind his employer, the defendant corporation, by admissions as to the cause of the accident than had Smith, the man operating the lever and the brake. He was not the defendant corporation, and did not represent it for the purpose of making admissions as to the cause of the accident that had already occurred. If he made an admission as to such cause, he was not in doing so performing on behalf of the defendant corporation any duty by law imposed upon it, and was not, as to such admission, the representative of his employer. The admissions of an agent are not binding, unless they are made not only during the continuance of the agency, but in regard to a transaction then pending at the very time they are made."

Luman v. Golden Ancient Channel M. Co., 140 Cal. Rep. 700, 709.

And so, with the telegram; it was equally incompetent hearsay, no part of the *res gestae*, and an *ex post facto* opinion of Reed in no way binding upon the company. Speaking of this telegram, Mr. Skinner advises us that it was even later in time than the declaration that "I have ruined the last cow with this machine that I expect to ruin"; and he tells us: "He quit and I took him into town. * * * Reed quit. After he went in town, he sent Mr. Frank a telegram" (133); and clearly, therefore, this telegram episode occurred after Reed had abandoned his undertaking, whether with the company or with Skinner; and the telegram was not only inadmissible but highly prejudicial to the

company as a glance at its contents will disclose. And moreover, no proof was made of the receipt of the telegram by the company, or, what is more to the point, that the company acted upon or acknowledged it in any way whatsoever. No proof is made that this telegram was ever confirmed or ratified by the defendant company, nor was any proof made that the defendant company ever acquiesced in the contents of this alleged telegram: but is it not the law that before messages sent *to* a party can be used against him, there must be, not only evidence that he received the messages, but also proof of some act, reply or statement evidencing acquiescence in their contents? What respectable authority takes the ground that the omission to reply is an admission of the truth of any matter stated in the message (*Jones, Evidence*, Sec. 269, p. 336)? Is it not the rule that a telegram not answered or acted on is neither admissible as *res gestae*, nor as an implied admission of its contents (*Packer v. U. S.*, 106 Fed. 906)? And, for a further illustration, is not the admission of unanswered incriminating messages written by a *particeps criminis*, prejudicial error (*Marshall v. U. S.*, 109 Fed. 511)? Indeed, it is the settled law that where messages, whether telegrams or letters, are sent to a person, they are not evidence of the truth of their contents, or binding upon the receiver, unless, besides the mere possession of the message, there is proof of acquiescence in it; and in the absence of proof of acts evidencing acquiescence in the contents of the message, the message is the

merest hearsay. In support of this proposition, see, among other cases, the following:

Smith v. Shoemaker, 84 U. S. (17 Wall.) 630;
Sorensen v. U. S., 168 Federal, 785, 794-7;
People v. Colburn, 105 Cal. 648;
Casey v. Leggett, 125 id. 673-4;
People v. Lee Dick Lung, 129 id. 491, 492;
Razor v. Razor, 36 N. E. (Ill.) 963, 964;
Payne v. Com., 31 Gratt. (Va.) 855, 859;
Com. v. Eastman, 48 Am. Dec. (Mass.) 596;
Learned v. Tillotson, 97 N. Y. ,1);
State v. Shive, 51 Pac. (Kan.) 274.

But again: even if we go the length of assuming that the declarations and telegram of Reed occurred prior to the termination of this assumed agency, still they would not be competent as against this defendant company. In order to bind a principal, an agent's declarations are admissible only so far as the agent has authority (*W. U. Tel. Co. v. Way*, 4 So. (Ala.) 844; *Barry v. Ins. Co.*, 29 N. W. (Mich.) 31; *Ruggles v. Ins. Co.*, 11 A. S. R. 674): the declarations must be made in the line of the agent's duty and within the scope of his authority (*Weeks v. Inhabitants*, 31 N. E. (Mass.) 8; *Pittsburgh Co. v. Kirkpatrick*, 52 N. W. (Mich.) 628; *Van Doren v. Bailey*, 51 N. W. (Minn.) 375): the declarations must be made during the continuance of the agency, with regard to a transaction then pending; they must be, not only within the agent's authority, but also part of the *res gestae*—must accompany an act that the agent was authorized to do, and his declarations after his acts have ceased—when he

has “quit”—are inadmissible hearsay and mere narratives of a past event (11 Q. B. 46: 8 Bingh. 451: *Haven v. Brown*, 22 A. D. 208: *Thallheimer v. Brinckerhoff*, 21 id. 155: *City Bank v. Bateman*, 7 Harr. & J. (Md.) 104: *Parker v. Green*, 8 Metc. 142: *Hannay v. Stewart*, 6 Watts, Pa., 487: *Woods v. Banks*, 14 N. H. 101: *Hayward Rubber Co. v. Duncklee*, 30 Vt. 29: *Raiford v. French*, 11 Rich. (S. C.) 367; *Winter v. Burt*, 31 Ala. 33: *Burgess v. Inhabitants*, 7 Gray 345; *Vail v. Judson*, 4 E. D. Smith (N. Y.) 165: *Idaho etc. Co. v. Ins. Co.*, 17 L. R. A. 586); and these rules are supported by the Federal cases (*Merchants Bk. v. Bk. of Columbia*, 5 Wheat. 336: *Union etc. Co. v. Robinson*, 79 Fed. 420: *Cliquot’s Champagne*, 3 Wall. 114, 140: *Goetz v. Bank*, 119 U. S. 551: *Vicksburg Ry. v. O’Brien*, 119 U. S. 99: *R. P. Ry. v. Kempton*, 138 Fed. 992: *Xenia Bank v. Stewart*, 114 U. S. 224). In this connection the language of the opinion in *Goehrig v. Stryker*, 174 Fed. 897, is apropos:

“Admissions of an agent, to be admissible, must be in the course of his agency, and be concerned with the furtherance of it. Mere declarations after the fact, and unconnected with the prosecution of his agency are no more admissible against his principal than those of an entire stranger. The subject is very much confused by the efforts which are constantly being made to get in the statements of an agent, under the guise of their being part of the *res gestae*. But they are admissible as such only when they enter into the occurrence as a constituent fact, and not as mere declaration, and where this is not the case they have no evidentiary value. After the transaction is complete, any statement with regard to it, from whatever source, becomes purely descriptive of the event, and are not within the province of the agent to make; his agency not being to that end.”

And see also, *Vicksburg Ry. v. O'Brien*, 119 U. S. 99, where the Supreme Court said:

“His declaration after the accident had become a completed fact, and when he was not performing the duties of engineer, that the train, at the moment the plaintiff was injured, was being run at the rate of 18 miles an hour, was not explanatory of anything in which he was then engaged. It did not accompany the act from which the injuries in question arose. It was, in its essence, the mere narration of a past occurrence, not a part of the *res gestae*—simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted. It is not to be deemed part of the *res gestae*, simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it.”

See also, *Packet Co. v. Clough*, 87 U. S. 528, where it was said by the same court:

“A captain of a passenger ship is empowered to receive passengers on board, but it is not necessary to this power that he be authorized to admit that either his principal or any servant of his principal has been guilty of negligence in receiving passengers. There is no necessary connection between the admission and the act. * * * An act done by an agent cannot be varied, qualified, or explained, either by his declarations, which amount to no more than a mere narrative of past occurrence, or by an isolated conversation held, or an isolated act done at a later period. The reason is that the agent to do the act is not authorized to narrate what he had done or how he had done it, and his declaration is no part of the ‘*res gestae*’ ”.

And the case last cited was approved as authoritative in a later case in the same court, where the court said:

“The third assignment is of more importance. The plaintiffs were allowed in the cross-examination of one of the defendants’ witnesses to ask whether one Dearing, the general traveling agent and supervisor of the defendants in the Southern States, did not, some time after the death of Dillard, and after he had made an examination of the claim of the plaintiffs, express an opinion that it should be paid. To this question the witness replied that Dearing had expressed his opinion that it would be best for the defendants to accept the situation and pay the amount of the policy. That such an opinion allowed to go to the jury must have been very hurtful to the defendant’s case is manifest, and that it was inadmissible is equally clear. The opinion of an agent, based upon past occurrences, is never to be received as an admission of his principals; and this doubly true when the agent was not a party to those occurrences. We have so recently discussed this subject in *Packet Co. v. Clough* that it is needless to say more. For the error in receiving this evidence the judgment must be reversed.”

Amer. L. & I. Co. v Mahone, 88 U. S. (21 Wall.) 152, 157.

This, then, is the law with regard to declarations of *fact* made by an agent: they must be made contemporaneously with the act to which they refer: if the act be a past event, no subsequent characterization of it, no subsequent assertion of fact concerning it, is admissible; and the declarations of Reed, both to Skinner and as contained in the telegram, are obnoxious to these rules. But the instant case presents a situation in which the declarations are even less competent, because they are declarations, not of fact,

but of the asserted agent's mere opinions—declarations of a sort wholly beyond the scope of any asserted agency. The situation here recalls that presented in *Fidelity and Casualty Co. v. Haines*, 111 Fed. 337. In that case, the plaintiff went to the defendant's agent to insure against burglary: later, a burglary was committed upon his premises: the defendant's agent declared that the plaintiff was insured against the loss: the admission of this declaration was held to be error, the Circuit Court of Appeals saying:

“This was nothing but his individual opinion or conclusion, which he was neither authorized to make, to form nor to express for his company. * * * What he said was not a part of the things done in closing the agreement. It did not even rise to the dignity of a narrative of a past event. It was nothing but his conclusion as to the legal effect of the things that had been done by his company, Haines and himself before the burglary.

“A principal is not bound by the opinions or conclusions of its agent which it does not empower him to form or to express on its behalf.

“Many other questions are presented by the assignments of error, but it is unnecessary to a decision of this case to determine them, because the ruling already considered was material, erroneous and fatal to the verdict.”

And so, in *Plymouth Co. Bk. v. Gilman*, 44 A. S. R. 782, this point of view is recognized, the court saying:

“But while we think it was competent to give the statement of the cashier as to any *fact* relating to the collection of the notes, we are of the opinion that it was not competent to give his statements that the failure to collect the notes was the ‘fault’ and ‘neglect’ of the bank. Those were not the statements of the facts relating to the collection or non-collection of the notes, but

an expression of the mere opinion of the cashier as to the conduct of the bank. It was no part of his duty as cashier, or in the line of his duty, to express any opinion as to the performance or failure to perform its obligations to the defendant. * * * The statement * * * was very material, and this court cannot say that the admission of this testimony did not unjustly prejudice the plaintiff's case. That question was one for the jury to decide upon all the facts in the case, uninfluenced by a statement of an officer of the bank as to his opinion of the conduct of the bank."

The point here made, which suggests the double viciousness of the error now complained of may further be illustrated by the language of the Supreme Court of the State of California, in *Boone v. Oakland Transit Co.*, 139 Cal. 490, 492-3, where that court said:

"Over the objection of the defendant, a witness was allowed to testify that when the car stopped after the accident, and after the conductor had gone from the place where it stopped to the place where the plaintiff lay, and again returned to the car, the witness had a conversation with him, in which he said: 'These ladies seem to blame me—seem to think it is my fault.' This was not a part of the *res gestae*. It happened after the accident, and after a sufficient time had elapsed for the defendant to walk almost half a block and back again. *It was not even a relation of the facts which caused the accident, but was a mere statement of the opinion of third persons as to who was at fault.* Its admission was against all the rules with relation to *res gestae*. Nor can it be said that the testimony was not injurious. Its effect was to get before the jury the opinions of the persons who saw the accident that the cause was the fault of the conductor,—that is, that it was due to his neglect. *Such opinions, expressed at the time, are likely to have great weight with a jury. There can be no question that the opinion of a witness who saw the accident, whether or not it was caused by the negligence*

of the defendant, would not be admissible, and would be injurious if allowed. With much more reason can it be said that hearsay statements as to the opinions of third persons, not placed upon the witness-stand, and not subject to cross-examination, are both inadmissible and injurious, if directed to a material point in the case."

In other words, even in a case where the declaration is made by a person who is really the agent of the party against whom the declarations is offered, the declaration does not become competent simply because of the relation of agency: the offered declaration must be a statement of fact made in furtherance and within the scope of the agency, and contemporaneously with the occurrence of the fact; but a statement of opinion, wholly gratuitous from any point of view, and expressing merely the agent's personal opinion or idea concerning the effect of some past transaction, or the manner in which some past act occurred or has been performed, is not admissible at all. In a word, Reed's statement to Skinner was clearly only an expression of his personal opinion as to the effect of completed acts; and his telegram stands upon the same footing, and is equally inadmissible; and both the declaration and the telegram occurred when any relation between Reed and the company—assuming that any relation ever existed,—came to an end by Reed's own act.

5. The Court Below Erred in Striking from the Testimony of Mr. Frank the Statement, "And I Believe that Reed Notified Skinner of this Fact, Too."

Assignment 72.

It is proper here to point out that Mr. Frank did not testify in person at the trial below. In anticipation

of the trial, his deposition had been taken on behalf of the company (251 *ad finem*); the statement stricken out by the learned judge below was, without objection, made as part of that deposition; and that statement was not made as part of the direct examination, but was elicited by the plaintiff below upon cross-examination. When this deposition came to be read at the trial below, the plaintiff then for the first time indicated dissatisfaction with his own handiwork, and asked the court to strike out a statement which he had himself elicited from the deponent; and in making his motion to strike out, the plaintiff below stated no ground, vouchsafed no reason, and did no more than to make a bald request to the court, which request the court complied with. We submit that such procedure as this should not be countenanced. We submit that the grounds of a motion to strike out, should be plainly stated, so that, in fairness to court and counsel, an opportunity may be afforded to remedy any defect that may really be. The statement of the grounds upon which the motion proceeds, would at once disclose any existing defect; and if a defect were present, it could, should the situation permit, be at once obviated. But the contrary course, whereby a point, ground or reason is

“held in ambush till the case has reached this court, when it came out in the open,”

T. & P. Ry. v. Lacey, 185 Fed. 226,

is fully as reprehensible as the practice whereby one

“is to object with a rattle of words that conceal the real nature of an objection capable of being removed on

the spot, and to announce its true character for the first time in the appellate court.”

N. Y. etc. Co. v. Blair, 79 Fed. 896.

In the present predicament, the testimony came into the deposition in response to the plaintiff's own inquiries: he was alone responsible for its presence; and when at the trial he sought to expunge it, he failed to state any ground to justify his repudiation of that which he had himself developed (*Tabor v. Bank*, 62 Fed. 383; *Thomas China Co. v. C. W. Raymond Co.*, 135 id. 25). It is the law that where no ground of objection is set forth, an objection is unavailing (*Toplitz v. Hedden*, 146 U. S. 252): vague objections are without weight, because the objector should point out some specific defect, and is confined to his specific objection (*Dist. Col. v. Woodbury*, 136 U. S. 450: *Moore v. Bank*, 38 id. 302: *Woodbury Co. v. Keith*, 101 id. 479): and where a particular objection is specified, it is considered that all others are waived, or that there was no ground upon which the others could stand (*Evanston v. Gunn*, 99 U. S. 660). It may, indeed, be said to be the settled law of the Federal courts that a motion of this sort should be of such a specific character as to indicate distinctly the grounds upon which the moveant relies, so as to give the other side full opportunity to obviate them, if under any circumstances that can be done (*Noonans Caledonia Gold Mg. Co.*, 12 U. S. 393, 400: *Patrick v. Graham*, 132 id. 627, 629: *Dist Col. v. Woodbury*, 136 id. 450, 462: *Toplitz v. Hedden*, 146 id. 252, 255: *Chicago Ry. v. De Clou*, 124 Fed. 142: *Guarantee Co. v. Phoenix Ins. Co.*, id 170: *Davidson S. S. Co. v.*

U. S., 142 id. 315: *Shandrew v. Chicago Ry.*, id. 320, 321-2: *Sparks v. Terr.*, 146 id. 371: *Am. Car Co. v. Brinkman*, id. 712). A mere nude request to the court to strike out certain testimony is not, therefore, in the absence of some substantial legal reason, enough: such procedure should be classified with the abortive "I object", which, for any legal purpose, is equivalent to silence (*Bishop v. Wight*, 221 Fed. 392, 397).

In the next place, in casting about for some possible explanation of this ruling, one might hazard the guess that because the form of expression adopted by the witness was "and I believe that Reed", etc., therefore the learned judge below considered that the witness was testifying to hearsay. If this was hearsay, it was hearsay elicited by the very party who, later, moved to strike it out: but we submit that it is not lightly to be assumed that a statement is hearsay because ushered in by the phrase "I believe". Every lawyer of experience knows how prone witnesses are to use such phrases as "I believe", "I considered", "I judge", "I understand", "I take it", etc.; and it by no means follows that because a witness may chance to employ one of these familiar phrases, he is therefore relating, not facts within his personal knowledge, but the tales of others. To suggest but a single natural hypothesis fairly arising upon admitted facts: that Mr. Frank had met Mr. Skinner, that he had talked with him and had discussed with him the very matters involved in this action (135), cannot be disputed: if in that discussion, Mr. Skinner had notified Mr. Frank of Reed's attitude, no one would pretend that this declaration

of the party plaintiff was hearsay: what is there here to show that these were not the facts upon which Mr. Frank rested his statement? “Reed advised me “of Skinner’s attitude”, says Mr. Frank: what was there to impede Skinner from advising Mr. Frank of Reed’s attitude?

In many cases, it has been held to be a sufficient answer to a motion to strike out that the evidence was received without objection: but in the cause at bar we have the added feature that the fact sought to be stricken out was not only received without objection, but was actually elicited by the moveant himself; and under such circumstances, we submit that the moveant should be estopped from expunging that which he himself introduced. If it be true that

“counsel must not be permitted to wink at the introduction of evidence to which they think there is a valid objection, hoping that it may benefit them, and, if it goes the other way, move to exclude it”

(*Rush v. French*, 25 Pac. (Ariz.) 816-822-3: cited with approval in 1 *Wigmore on Evidence*, 57); if it be true that

“parties will not be permitted to lie by and keep silent when evidence is offered”

Polidori v. Neuman, 116 Cal. 375;

if it be true that

“It is entirely clear that a party who has sat by during the reception of incompetent evidence without properly objecting thereto, and thus taken his chance of advantage to be derived by him therefrom, has not, when he finds

such evidence prejudicial, a legal right to require the same to be stricken out''

Le Coulteux de Caumont v. Morgan, 9 N. E. (N. Y.) 861-865;

if it be true that

“a party against whom a witness is called and examined cannot, as was done in the cause at bar, lie by, and speculate on the chances, first learning what the witness testifies, and then, when he finds the testimony unsatisfactory, object either to the competency of the witness, or to the form or substance of his testimony”

Westervelt v. Burns, 57 N. Y. S. 749-750:

if all this be true, and that it is true all the books agree, upon what principle may a litigant voluntarily develop evidence and then, upon a mere unreasoned request, succeed in eliminating it? May it not be reasonably urged that one who voluntarily introduces evidence of certain facts is thereby estopped to object to the consequences of his own voluntary action (see, by way of analogy, *Bogk v. Gassert*, 149 U. S. 17; *Sun Printing Assn. v. Edwards*, 113 Fed. 445; *Warren Live Stock Co. v. Farr*, 102 id. 116)? The relations between Skinner and Reed were not irrelevant, and were part of the history of the case: Skinner had repudiated the suggestion that Reed was working for him, but not for the company, saying, *inter alia*, “I did not trade with Mr. Reed: I did not consider “Mr. Reed in it at all” (136): Frank explains that “shortly after Reed went down there on October 20, “1914, he asked Skinner for his salary or part of it. “Then Mr. Skinner advised him that he, Reed, was “working for the Sharples Separator Company, and

“ Reed advised me of Skinner’s attitude, and I advised
 “ Reed that such was not the case, that he was working
 “ for Skinner” (256-7): all of this was developed by
 the plaintiff himself; and it was the plaintiff himself
 who brought out the fact of Reed’s notification to
 Skinner that he was working for Skinner but not for
 the company,—a fact which by no means adds any
 increased value to Reed’s belated assertion in his
 deposition that “I was working at that time for the
 “ Sharples Separator Company” (246-7); and in view
 of these circumstances, it may not be amiss to point
 out that the view which we are urging formed, as we
 believe, the *ratio decidendi* of the Diaz case. There,
 the Supreme Court said:

“It is objected that the accused was deprived of the
 right, secured to him by section 5 of the Philippine civil
 government act, supra, ‘to meet the witnesses face to
 face’, in that the judgment of conviction for homicide
 was rested in part upon the testimony produced before
 the justice of the peace at the trial for assault and bat-
 tery and at the preliminary investigation. But this
 objection overlooks the circumstances in which the record
 wherein that testimony was set forth was received in
 evidence. It was not offered by the government, but by
 the accused, and was offered without qualification or
 restriction. And it is otherwise manifest that the offer
 included the testimony embodied in the record as well
 as the recitals of what was done by the justice. It was
 all received just as it was offered, no objection being
 interposed by the government. In some respects the tes-
 timony was favorable to the accused and in others fav-
 orable to the government. It included a statement by the
 accused, who refrained from testifying in the court of
 first instance, and also the report of an autopsy which
 was favorable to him. In these circumstances the testi-
 mony was rightly treated as admitted generally, as
 applicable to any issue which it tended to prove, and as

equally available to the government and the accused. *Sears v. Starbird*, 78 Cal. 225, 230, 20 Pac., 547; *Diversy v. Kellogg*, 44 Ill. 114, 121, 92 Am. Dec. 154. True, the testimony could not have been admitted without the consent of the accused, first, because it was within the rule against hearsay, and, second because the accused was entitled to meet the witnesses face to face. But it was not admitted without his consent, but at his request, for it was he who offered it in evidence. So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection, it is to be considered and given its natural probative effect as if it were in law admissible. And of the fact that it came from witnesses who were not present at the trial, it is to be observed that the right of confrontation secured by the Philippine civil government act is in the nature of a privilege extended to the accused, rather than a restriction upon him (*State v. McNeil*, 33 La. Ann., 1332, 1335), and that he is free to assert it or to waive it, as to him may seem advantageous.” * * *

As here the accused, by his voluntary act, placed in evidence the testimony disclosed by the record in question, and thereby sought to obtain an advantage from it, he waived his right of confrontation as to that testimony, and cannot now complain of its consideration.”

Diaz v. U. S., 223 U. S. 422-449-450, 452-453.

6. The Court Erred in Excluding Evidence of the Operation of the Sharples Mechanical Milker at Westchester, Pennsylvania, and at San Leandro, California.

Assignments 35, 38, 39.

This plaintiff in error makes but one kind of mechanical milker. As Briggs tells us, “I am in the
 “employ of the Sharples Separator Company, and
 “familiar with their milking machine. They do not
 “make more than one kind of milking machines; all
 “machines are like the one here before me, identical;

“and that was true in 1914” (231): this testimony is nowhere disputed: it has received corroboration and support, both directly and indirectly, throughout the record (see as an example of this, Reed, 233-4); and it may be taken as an accepted fact in this cause that all Sharples mechanical milkers were, during the period here involved, to employ Briggs’ terms, “identical”. And Skinner’s own testimony, at page 136, as to the four units being “identically alike”, fully supports and confirms Briggs’ statement.

This being so; and it being the claim of the plaintiff below that, although properly operated in accordance with the instructions of the company, yet the milker did not operate conformably to the terms of the asserted guarantee; and it being the claim of the defendant below that any failure of the milker to give the requisite service was attributable, not to any shortcoming of the machine, but to the failure of Skinner properly to operate the same in the mode and manner required by, and “subject to the conditions of sale”, as those several conditions are formulated and specified in Exhibit 1 (112-114):—the defendant below sought to show that other milking machines, identical with that which the company sold to Mr. Skinner, had, when properly operated, furnished the requisite service in accord with the guarantee under which they were sold. The admission of the evidence was resisted by the plaintiff below as far as Westchester, Pa., was concerned, upon the ground that how other machines worked is not admissible to show compliance with the “warranty”, and the ground that it was incompetent,

“irrelevant and immaterial how some other machine “worked”, “and on the additional ground that no “foundation has been laid” (Assignment 35). And so far as San Leandro, California, was concerned, similarity of conditions was for the first time suggested to the lower court as the ground for exclusion, in an objection which seems to confuse the two discrepant conceptions of similarity and identity (Assignment 38); and when, in pursuance of the same effort, the defendant below sought to develop the results of the operation of the machine so far as the production of milk is concerned, the only objection presented was that “it “is incompetent, irrelevant and immaterial” (Assignment 39),—an objection which means nothing (*Noonan v. Caledonia Gold Mg. Co.*, 121 U. S. 393, 400).

When opposing the admission of this evidence, so far as Westchester was concerned, the objection was made “that no foundation has been laid”; but just what was intended to be conveyed by this enigmatic utterance, we are unable to determine, because, to employ Justice Field’s expression, it fails to “indicate distinctly” (*Noonan v. Caledonia Co.*, 121 U. S. 393, 400) any specific defect in the foundation for the question—if any such defect existed and had been “indicated distinctly”, it might turn out to have been “an objection capable of being removed on the spot” (*N. Y. etc. Co. v. Blair*, 79 Fed. 896), and the defendant below was entitled at least to the opportunity to do so if he could. This view of this objection becomes important when we consider that Dr. Hart, an experienced veterinarian whose qualifications were formally con-

ceded by the plaintiff below (189-190), had seen the milker in operation, and had examined the udders of cows upon which it had been used, and had—as a matter of professional interest, not being an employee of plaintiff in error—visited Westchester and made an examination there (Assignment 35): what further “foundation” could rationally have been desired?

But, still dealing with the Westchester phase, not only does the objection as to lack of foundation evaporate upon examination, but no claim whatever was made that the evidence was objectionable because of dissimilarity of conditions—*non constat* but that, had even a hint of this been given, similarity of conditions could and would readily have been shown. As already observed, vague objections to testimony are without weight for the pregnant reasons that all objections should point out some specific defect, the objector is confined to his specific objection, and it is considered either that all other objections are waived, or that there was no ground upon which they could stand. Since, therefore, the objection as to “no foundation” is itself without foundation in the particulars and for the reasons given, and since no objection based upon similarity or dissimilarity of conditions was made, the case, as to Westchester, comes solely to this, that “evidence as to how other machines worked is not admissible to show compliance with the warranty”. In other words, the question raised is this: in a case in which an objection based upon lack of foundation must be disregarded, and which is wholly uncomplicated by any consideration suggested by similarity or dis-

similarity of conditions, is evidence by comparison so stripped of any degree of probative force that it should be rejected? If not, then the learned judge erred in excluding evidence which might well have turned the scale in favor of defendant below—no man, indeed, could rightly say that it would not.

When we turn to the San Leandro phase, we are for the first time confronted with the thought of the similarity of conditions—though here, as already pointed out, similarity and identity seem to be treated as terms equivalent in signification, the language of the objection being, “our objections to the offer as it “ *now* stands are that it does not include any offer to “ show that the conditions under which this machine “ was operated were similar or identical with those “ under which the machine of the plaintiff was operated” (Assignment 38). Very obviously, this objection implies that, similarity of conditions being given, the foundation of the objection, and the objection with it, would crumble; and consequently, the point of interest here is the similarity of the conditions.

In what mental attitude are we to approach the consideration of the question thus raised? Shall we make that approach with minds closed to the value of inferential evidence, or shall we yield to the modern tendency, both of legislation and of judicial decision, to give as wide a scope as possible to the investigation of facts? Surely there can be but a single answer to this question. Mr. Herbert Spencer, the great thinker who so recently departed, has told us something of the relativity of knowledge: but experience teaches that

there is a relativity of facts as well. An isolated fact can scarcely be imagined: for facts are related like men, both antecedently and subsequently; and there is in all human situations, a train or sequence in the facts that make them up. While every transaction creates new relations, yet it is itself the birth or product of antecedent circumstances: it is this consideration which enables us to see in what goes before, the preparation, or seed, of what is to follow after; and hence the utility of considering circumstances which make antecedently probable a given or claimed consequence.

The authorities fully recognize the value of the probabilities in a cause; and as a consequence, the modern test of relevancy is liberality itself, particularly in causes depending upon circumstantial evidence.

“As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances, the more correct their judgment is likely to be. The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inference it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth. The modern tendency, both of legislation and of the decisions of the courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused.”

Holmes v. Goldsmith, 147 U. S. 150, 164.

Remarking upon the relativity of facts, Greenleaf observes:

“The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and, in its turn, becomes the prolific parent of others; and each, during its existence, has its inseparable attributes and kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature.”

1 Greenleaf, Evidence, 16th Ed., Sec. 108.

Speaking of moral coincidences, a learned court said:

“Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry, or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other; and circumstances, altogether inconclusive if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof.”

Continental Ins. Co. v. Ins. Co. of Penn., 51 Fed. 884, 887.

Speaking of antecedent probabilities, the law upon the subject is thus summed up by the Supreme Court of Indiana:

“It is a rule of elementary logic, as well as of rudimentary law, that evidence which tends to establish facts rendering it antecedently probable that a given event will occur, is of material relevancy and strong probative force.”

State v. Marvin, 95 Ind. 465; and see, also, Rugg v. Rohrbach, 110 Ill. App. 532.

And these views are supported by our own local courts:

“The tendency of modern decisions is to admit any evidence which may have a tendency to illustrate or throw any light on the transaction in controversy, or give any weight in determining the issue, leaving the strength of such tendency or the amount of such weight to be determined by the jury; and in determining the relevancy of evidence that may be offered upon an issue of fact much depends upon the nature of the issue to sustain which or against which it is offered, and a wide discretion is left to the trial judge in determining whether it is admissible or not. Mr. Thayer, in the introduction to his ‘Cases on Evidence’ says: ‘No precise or universal test of relevancy is furnished by the law. The question must be determined in each case according to the teachings of reason and judicial experience’; and Mr. Stephen in his ‘Digest of the Law of Evidence,’ says (Chapter 1): ‘The word relevant means that any two facts to which it is applied are so related to each other that, according to the common course of events, the one, either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other.’

* * * Probability is an element which addresses itself to the reason, and is frequently invoked in matters of human conduct and experience for determining the existence or non-existence of a fact. In civil cases, a jury is authorized to determine an issue of fact as its probability or improbability may appear to them from the evidence before them. Hence, any evidence tending to show either of these conditions is relevant to the issue to be determined by them. ‘If the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury.’ ”

Moody v. Pierano, 4 Cal. App. 411, 418, 420.

We respectfully submit, therefore, that in the light of these authorities, and in the light of the history

disclosed in the record in this cause and attempted to be related in our general statement of the case, and particularly in the light of the testimony of Mr. Briggs that the defendant company "do not make " more than one kind of milking machine; all machines " are like the one here before me, identical; and that " was true in 1914" (231), the questions thus raised should be approached in the spirit suggested by the modern tendencies of the law of evidence, that no supernatural smilarity of conditions should be demanded, that a reasonable similarity of conditions should suffice, and that, given such reasonable similarity, evidence showing the successful operation of the defendant company's machine elsewhere, would be relevant and material in the cause at bar, and would, in the language of the Supreme Court of the United States, at least,

"tend, in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth"

Holmes v. Goldsmith, supra.

And while this language just quoted illustrates the extent to which the Supreme Court goes in this direction, it is not to be inferred from our quotation of the language that in our opinion the evidence being discussed would tend only "in a slight degree", or "remotely", to a determination founded in truth: on the contrary, we contend that had the evidence under discussion been admitted by the learned judge of the court below, it would have induced a verdict contrary to that which is now being attacked.

Usually, upon an issue of compliance with a warranty, the contention of the vendor is that the article sold is

good, and that of the vendee is that it is bad: as an item of evidence tending to support his contention, the vendor shows that other like things—in this case “identical” things (231)—are good; and it must be plain that this “evidence by comparison” creates and justifies a strong inference of the similarity of the subjects of comparison. It cannot, we submit, be denied that evidence by comparison has probative force: no reasonable person can fail to see the probative force of proof that the “identical” machines have been successfully operated in many other instances; and while evidence that other machines were operated successfully might not have the effect of conclusively establishing that this machine was capable of successful operation, yet it would nevertheless tend strongly to establish that the machine was suited to the ends for which it was made, and that the alleged failure asserted in this instance was the result, not of any non-compliance with the alleged warranty, but of some fault in the manner of its operation by Skinner or of some failure upon his part to comply with the “conditions of sale”; or, on the other hand, such evidence would tend strongly to show that the alleged injuries to the cows were not the result of the operation of the machine, but were entirely due to the presence of infectious mammitis generated by insanitary environment, as contended by the defendant below. If a buyer complains that the flour delivered to him at the mill is sour and unfit, but the miller shows that he delivered to other customers flour of the same grade from the same bin, and these other customers testify that they

found the flour sound and sweet, does it not seem reasonably fair to say that the flour was probably good? So likewise, if the maker of a harvester proves that he sold a number of harvesters of the same pattern that season, and the buyers testify that these all worked well, is not this reasonable proof that there is no real defect in the machine, and that the machines were carefully made and carefully looked over before shipment? In view of the modern tendency to give as wide a scope as possible to the investigation of facts, why should evidence of this character be rejected? Such evidence is quite as fair to one side as to the other—to the buyer as to the seller; if the seller may show other machines to be good, the buyer may show other machines to be bad; and even though it may not, in and of itself, standing alone, and uncomplicated by any other fact or circumstance, conclusively establish compliance with the alleged warranty, yet that objection would go, not to its admissibility, but to its weight; and it may well be, in easily imagined, evenly balanced cases, that this evidence by comparison, when considered not only in itself but also in connection with other facts and circumstances appearing in the cause, would become of commanding and decisive significance. As observed by the court in *Baker v. Rickart*, 52 Ind. 594, where it was held that the seller may show the efficiency of a patent ditching machine warranted to do certain work in a certain county in Ohio, by proving the quantity and quality of work done by machines of the same pattern and construction in a certain county in Illinois:

“The weight of such evidence would greatly depend upon the difference in the soil and other surroundings of

the two places. Such a machine might perform well in one character of soil, and yet would fail in another and different character of soil. Evidence ought not to be excluded because it is entitled to but little weight and consideration. The difference between the competency and weight of evidence is marked and clearly defined. That which is competent, whether weak or strong, should be admitted. Evidence which tends to prove some fact in issue is admissible. We think the evidence is competent."

It may, indeed, be said that, by the general weight of authority, proof by comparison is admissible, provided only that the similarity of the subjects of comparison is reasonably sufficient to give the result of the comparison some probative force; and here, the subjects of comparison were not only similar, but they were "identical".

There is a generalization in *City of Bloomington v. Legg*, which formulates the theory of this matter. There the court said:

"Where an issue is made as to the safety of any machinery or work of man's construction, which is for practical use, the manner in which it has served that purpose, when put to that use, would be a matter material to the issue; and ordinary experience of that practical use, and the effect of such use, bears directly upon such issue. It no more presents a collateral issue than any other evidence that calls for a reply which bears on the main issue. Such evidence is held competent by the weight of authority. *Coke Co. v. Graham*, 35 Ill. 346; *City of Chicago v. Powers*, 42 Ill. 170; *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 743; *City of Topeka v. Sherwood*, 39 Kan. 690, 18 Pac. 933; *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. 840; *Darling v. Westmoreland*, 52 N. H. 401. The same rule is adopted in Georgia, Alabama, Connecticut, Minnesota, Michigan, and other states."

City of Bloomington v. Legg, 37 N. E. (Ill.) 696, 697.

This matter has received the attention of the Supreme Court of the United States in a cause, wherein that learned court took the ground that, the quality of goods furnished at a given time by the plaintiff to the defendant being in question, it is competent for the plaintiff to show that the quality of like articles furnished at the same time by him to another party was good, if such evidence be followed by evidence that the goods furnished by him at that time to such other party and the goods furnished by him at that time to the defendant were of the same kind and quality (*Ames v. Quimby*, 106 U. S. 342): in a Massachusetts case, Mr. Justice Holmes took the ground that where the plaintiff sought to show, as in the present instance (127), that the defendant's article was worthless for the purpose for which it was intended to be used, the defendant had the right to meet that claim by the testimony of users of the same article supporting its usefulness (*Reeve v. Dennett*, 11 N. E. (Mass.) 938).

In a recent case, the court, after pointing out that the first question presented related to the ruling of the lower court to the effect that the plaintiff could not show that other apparatus similar in character to the one which plaintiff had sold defendant, when properly operated, satisfactorily heated the buildings in which they were installed, proceeded to say:

“Bearing in mind that it was the contention of the defendant that, though properly operated in accordance with the instructions of the plaintiff, the heater would not heat the defendant's school house in accordance with the terms of the guarantee, and that the plaintiff claimed that any failure of the heater to give the requisite service was attributable solely to a failure on the part of the

defendant to properly operate the same, we are of opinion that this testimony was admissible.”

Waterman-Waterbury Co. v. School District, 148 N. W. (Mich.) 673.

In an Iowa case, it was held that upon an issue as to the sufficiency of a heating apparatus to properly warm a building, where it was claimed that its failure was due to the faulty construction of the building, and to the failure of the plaintiffs to put it in proper condition so that it might be heated by the amount of radiation which the defendants agreed to furnish, evidence of the comparative results obtained from such plant, and another subsequently replaced in the same building is admissible (*Kramer v. Messner*, 62 N. W. (Iowa), 1142): in a Massachusetts case, in an action for the price of a loom attachment, sold under agreement that it should work successfully, the evidence was conflicting on the point whether it did so work, and the plaintiff was permitted against the defendant's objection, after introducing evidence that the defendant's loom and another loom were substantially alike in their mechanical arrangements. though differing somewhat in details, to put in evidence that the attachment had worked successfully on the latter loom, but the evidence as to the similarity of the two looms was conflicting, and it was held that the evidence objected to was rightly admitted, and that the question of the similarity of the two looms was properly submitted to the jury (*Brierly v. Davol Mills*, 128 Mass. 291); and in an Indiana case, it was said by the appellate court that

“objection is also made to the admission of evidence to show that other furnaces installed by appellee, furnished heat satisfactorily. There was testimony to the effect that the furnace did not supply heat as agreed. The evidence objected to was properly admitted to show the capacity of the furnace to furnish the guaranteed amount of heat”, citing many cases.

Beach v. Huntsman, 85 N. E. (Ind.) 523, 525-6.

In illustration of the proposition that the rule for which we are contending is just as fair to the buyer as it is to the seller, see:

Hazelhurst Compress Co. v. Boomer Compress Co., 48 Fed. 803;

Lyon v. Martin, 2 Pac. (Kan.) 790;

Sandwich Mfg. Co. v. Nicholson, 13 id. 597;

Dempster Mfg. Co. v. Fitzwater, 49 id. 624.

And see, generally, as supporting the view for which we are contending, the following cases, among others:

Findley v. Pertz, 74 Fed. 681;

Ward v. Blake Mfg. Co., 56 id. 437;

Acme Cycle Co. v. Clark, 61 N. E. (Ind.) 561;

Davis v. Oakland Chemical Co., 105 N. Y. S. 693;

Frereich v. Gemmon, 11 N. W. (Minn.) 88;

Luetgert v. Volker, 39 N. E. (Ill.) 113;

Barnett v. Hagen, 108 Pac. Co. (Idaho), 743;

Paulson v. D. M. Osborne Co., 27 N. W. (Minn.) 203;

Avery v. Burrall, 77 N. W. (Mich.) 272;

Nat. B. & L. Co. v. Dunn, 6 N. E. (Ind.) 131.

It is, we submit, no answer to our complaint as to the exclusion of this Westchester testimony to say that in one or two other places in the record references may

be found to the successful operation of other milking machines of the plaintiff in error: no objection of this character was made to the excluded testimony: it would be a somewhat novel proposition that a litigant must be restricted to a single channel of proof, no matter what the circumstances; and a claim of that character would be reminiscent of the antiquated and debilitated subterfuge whereby it is sought to break the force of testimony by admitting the fact sought to be proved—a proceeding concerning which the Supreme Court of Maine observes:

“It does not lie in the power of one party to prevent the introduction of relevant evidence by admitting in general terms the fact which such evidence tends to prove, if the presiding justice, in his discretion, deems it proper to receive it. Parties, as a general rule, are entitled to prove the essential facts—to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight.”

Dunning v. Maine Cent. Ry., 39 Atl. (Me.) 352, 356.

We respectfully insist, therefore, that should any indirect references be found in the record to the successful operation of other machines of the company, such references would furnish no valid reason why the defendant below should not have availed itself of this Westchester testimony or should have been denied the benefit of it; and the view for which we are contending was recognized in a well-considered decision by a court of high standing. The case was one of tort, brought to recover damages for personal injuries received by the plaintiff when seeking to use an elevator maintained

in a prominent building rented to various tenants, but the ownership of which was admitted by the defendants. The defendants had a verdict below, and the case went up on exceptions taken, *inter alia*, by the plaintiff to the exclusion of certain evidence offered by him. It appeared that the defendant, though admitting ownership of the building, yet denied control over the elevator at the time of the accident, and in order to establish such control, the plaintiff formally offered to show that shortly before the accident the defendants had procured a policy of indemnity insurance against loss or damage from accidents happening in operating the elevator, and that such insurance was in force when the plaintiff was injured,—the obvious argument being that the defendants would not have deemed it prudent to secure indemnity insurance on an elevator not within their control, or for the careless management or defective condition of which they could not be held responsible. This evidence was excluded below, but the Supreme Judicial Court held that proof of any act of the defendants whom it was sought to hold, tending to show the exercise by them of dominion over either the premises containing the elevator, or the elevator itself, was competent and admissible, and that the exclusion of the plaintiff's offer of proof was erroneous. The court, in this opinion, formulated the principle to which we appeal, in the following language:

“The fact that there was uncontradicted testimony, which, if believed, was amply sufficient to prove that the defendants had not relinquished, but retained, such control, does not cure the error, *for the plaintiff was entitled to the full benefit of any and all relevant and material evidence properly offered by him upon the issue.* Nor

can it be held that the large discretionary powers of the Superior Court include the right to reject evidence at a jury trial, when regularly offered, because, in the opinion of the presiding judge, sufficient proof, if believed, has already been introduced to establish the fact to be proved.”

Perkins v. Rice, 72 N. E. (Mass.) 323, 325.

So far as this Westchester phase is concerned, no objection was made that the conditions were not shown to have been similar: that objection was presented for the first time when the successful operation of the San Leandro machines was sought to be shown; and as then presented, the objection was that the defendant below did not show that the conditions under which the San Leandro machines were operated were “*similar or identical*” with those under which Mr. Skinner’s machine was operated. No discrimination between similarity and identity of conditions was made in the ruling of the learned judge excluding the proffered evidence, and one can only conjecture as to the ground upon which the ruling proceeded; but if the learned judge based his ruling upon the theory that the conditions should have been “*identical*”, this would have been to demand the accomplishment of an impossibility, and to have arrayed himself in opposition to all of the relevant authorities. And while the authorities speak of similarity of conditions, yet they do not demand any unreasonable, supernatural or ideal similarity; all that is required is that the similarity of the subjects of comparison is reasonably sufficient to give the result of the comparison some probative force. (*Finley v. Pertz*, 74 Fed. 681; *Baber v. Rickard*, 52 Ind. 594; *Ward*

v. Blake Mfg. Co., 66 Fed. 437; *Brierly v. Davol Mills*, 138 Mass. 291; *Beach v. Huntsman*, 85 N. E. Ind. 523); and as observed by the Supreme Court of Indiana (*Baber v. Rickart*, 52 Ind. 594),

“The difference between the competency and weight of evidence is marked and clearly defined. That which is competent, whether weak or strong, should be admitted”;

and it would be the province of the jury to appraise the probative force of the evidence—to determine its weight and the effect to be given to it.

In the cause at bar, it is the contention of the defendant in error that his dairy was a normal Imperial Valley dairy—a dairy fairly representative of Imperial Valley dairy standards; he claims that upon this dairy he had a perfectly normal herd of cows; he admits the mechanical milker in question to have been the regular Sharples mechanical milker; and he makes no attempt to dispute in any way, but on the contrary confirms (136), the statement of Briggs that “I am in the “employ of the Sharples Separator Company, and “familiar with their milking machine. They do not “make more than one kind of milking machines; all “machines are like the one here before me, identical; “and that was true in 1914” (231):—in such a situation what conditions can be material except the presence of the machine and the cow? Given the cow and the mechanical milker, no other circumstance or condition can possibly be material except fault or carelessness of the person operating the milker, disregard of the “conditions of sale” subject to which the milker was sold, or the presence of contagious disease engendered by insanitary environment, the operation of which is

independent of the milker. But these latter conditions the defendant in error persistently denies: what conditions then are material except the presence of the milker and the milkee? The objection made below, upon which the exclusion of this testimony was effected, could not have been addressed to any difference in dairy management or environment. So far as this feature is concerned, and what is here said is quite as true of Westchester as of San Leandro,—the dairy management and environment at San Leandro were either worse or better than those at the Skinner dairy. If those conditions upon the San Leandro dairy were worse than the corresponding conditions upon the Skinner dairy, this would very plainly strengthen the inference, in favor of defendant below, to be derived from the fact that, notwithstanding the worse conditions, the machines had been successfully operated (see in this connection the remarks of the court in *Kramer v. Messner*, 69 N. W. (Iowa) 1142, 1144). And if, upon the other hand, it was the Skinner dairy that was in a bad condition, this would tend to establish the contention of the defendant below that the alleged injuries to the animals in question resulted from faulty and careless management and insanitary environment, and not at all from any inherent quality of the machine—it would show that the alleged condition of the cows was due to Skinner's failure properly to comply with the "Conditions of Sale", or to infection generated by insanitary surroundings, or to both causes. And finally, what possible effect can either climate or geographical location have upon the operation of a mechanical milker upon a cow? Assuming that no two climates are in

all respects exactly similar, the cow remains the cow, the machine continues to be "identical", and the process of withdrawing the milk continues unchanged, no matter what the geographical location may be: difference of latitude necessitates no alteration of these elements; and in numerous cases in which a breach of warranty like the present has been alleged, evidence of the operation of similar machines has been admitted, without any suggestion that geography or climate can have any possible bearing upon the case, and without any requirement that similarity of conditions in that regard should be shown. All that is necessary is, indeed, that similar machines should be doing similar work, and it is not even required that the machines themselves should be in all respects identical.

The following cases, *inter alia*, support, we think, the contention which we are here making:

- Frohreich v. Gemmon*, 11 N. W. (Minn.) 88;
- Waterman-Waterbury v. School District*, 148 N. W. (Mich.) 673;
- National Bank v. Dunn*, 6 N. E. (Ind.) 131;
- Acme Cycle Co. v. Clark*, 61 N. E. 561;
- Glaeser v. Hoeffner*, 68 Mo. App. 158;
- Beach v. Huntsman*, 85 N. E. 523.

Clearly, if the defendant below had been permitted to show that the mechanical milker had been operated successfully in every locality into which it had been introduced, and that the only trouble with cows had occurred in Imperial Valley, this would have tended strongly to the conclusion that the Imperial Valley cattle were in fact diseased, as contended by the defend-

ant below: the exclusion of this evidence left the jury with the alleged Imperial Valley failures alone before them for consideration, withheld from the jury the numerous instances of success elsewhere, and wholly prevented from appearing the true significance of the isolation of Imperial Valley in respect of the condition of disease so earnestly contended for by the defendant below; and the defendant below was, we submit, entitled to go to the jury upon the proposition that when the dairy situation in Imperial Valley is viewed in comparison with, and in contrast to, the absence of any injurious effect by the mechanical milker upon the cows anywhere else, the conclusion that the true cause of the situation upon Skinner's dairy was disease generated by the conditions there, is strikingly intensified.

“The reason of the thing” and the great weight of authority are, therefore, in favor of the position taken by the defendant below, and opposed to the ruling of the learned judge here criticised. In the State of California, the condition of the law upon this point impresses us as being unsettled. In *Fox v. Harvester Works*, 83 Cal. 333, 343, it was held that

in an action for damages for breach of a contract of sale of harvesting machines manufactured by the defendant, which were warranted to do good work, and concerning the working of which certain representations and guarantees are alleged to have been made, whereby the purchase was induced, evidence for the defendant to the effect that other machines made of the same pattern and of like materials did good work, is not admissible,

and as the opinion shows, this ruling was made, apparently, without any analysis or even citation of authority. The ruling seems to have been based upon four reasons,

the bases of which have already been discussed in this brief. The first of these reasons was that the working of other machines was an "outside" issue: but, as we have seen, according to modern conceptions of evidence, nothing which can throw light upon a controverted issue is "outside", and relevancy is a matter, not of law, but of logic. This criticism meets the second reason also, namely, that while other machines may have worked well, the one in question may not,—a reason which ignores every consideration suggested by relevant, that is, logical, inferences, and the wide scope given to the investigation of facts. The third reason given is that the conditions may not have been the same: but that aspect of the matter has also been discussed heretofore in this brief. And the fourth reason given is that the other machines may have been better built,—a reason squarely met by the uncontradicted testimony of Briggs, confirmed by Skinner (136), to the effect that all of the machines made by the plaintiff in error were "identical" (231). The case of *Stockton etc. Works v. Glens etc. Co.*, 121 Cal. 167, may be passed by with the remark that it was but an echo of the Fox case, and contributed no addition of any importance to the literature of this subject.

Then came the case of *Yick Sung v. Herman*, 2 Cal. App. 633, in which we begin to perceive a departure from the views of the Fox case.

The case last cited was an action to recover for certain potatoes alleged to have been sold by plaintiff to defendant, and in which the defendant set up that the potatoes were not up to the quality specified in the con-

tract. The contract in the case called for potatoes which were to be sound and merchantable, and of fancy quality, and it was dated November 20, 1902. During the course of the trial a witness named McMillan was placed upon the stand by the plaintiff for the purpose of showing that he saw the plaintiff digging and sacking certain potatoes between November 20th and December 1, 1902, and that the condition of the potatoes he saw was good; and the appellate court held that the lower court did not commit error in overruling the defendant's objections to this testimony. In passing upon the matter, the court observed that

“In view of the fact that there was testimony tending to show that the land was all of *about* the same quality, and the potatoes all *about* the same, the evidence was competent. It was *about* the time that plaintiff was digging and delivering the potatoes to defendants.”

Then followed the more recent case of *North Alaskan etc. Co. v. Hobbs Wall & Co.*, 159 Cal. 380, in which certain evidence as to the condition of other articles was excluded for the reason that there was an absence of similarity of conditions, the court saying:

“It is claimed that the court erred in sustaining objections to certain questions asked of the witnesses Wall and Hotchkiss. It was the theory of the defendant that the rusting of the cans after they were packed in the boxes furnished by the defendant was not caused by the wetness or dampness of the boxes, but by drops of moisture which were left upon the cans by the American Can Company in manufacturing them. These witnesses testified that they had examined a number of cans made by the can company for the plaintiff and found upon them beads of moisture, indicating that they were damp from some defect in the making of the cans. They then testified that they saw other crates filled with cans which it is conceded

were not a part of the cans manufactured for the plaintiff. With regard to these they were asked: 'What was the condition of these cans as to showing moisture?' Objection was made that the evidence was irrelevant and immaterial, since the cans referred to were not of those manufactured for the plaintiff. This objection was sustained and the ruling was assigned as error. We think the ruling was correct. *There was no offer to show and it did not appear that the cans to which the question referred were manufactured in the same manner or by the same process as those supplied for the plaintiff.* The evidence was clearly collateral and irrelevant to the issue."

Plainly, as we read this opinion, if it had appeared that the cans to which the question referred were manufactured in the same manner or by the same process as those supplied for the plaintiff, the evidence would have been neither collateral nor irrelevant to the issue: but in the cause at bar we have uncontradicted evidence that the milking machines referred to were manufactured in the same manner and by the same process as that supplied to the defendant in error—indeed, as Briggs has testified without contradiction that all the milking machines used by the present plaintiff in error were "identical"—so "identical", indeed, that Skinner could not tell them apart (136). In other words, as we read this most recent California case, we interpret it as postulating the admissibility of the proposed evidence provided a reasonable similarity of conditions appears.

But, not only is *Fox v. Harvester Works*, 83 Cal. 333, opposed to the weight of authority upon this question, but the question itself is one upon which the Federal courts will exercise their own independent judgment. If it be said that in matters regulated by State statute,

the Federal courts will enforce such State statutes within the appropriate jurisdiction, the obvious reply is that so far as the present inquiry is concerned, no State statute is in existence applicable to the matter in hand.

In other words, it is proper to point out that the courts of the United States are not controlled, upon matters governed by the general principles of jurisprudence, by the views entertained by any particular State; and therefore the decisions of State courts upon such matters, no State statute thereon having been enacted, are not controlling upon the Federal courts (*Town of Venice v. Murdock*, 92 U. S. 494; *Genoa v. Woodruff*, id. 502; *Chicago v. Robbins*, 67 id. (2 Black) 418; *Swift v. Tyron*, 41 id. (16 Pet.) 1; *Goodman v. Simmons*, 61 id. (20 How.) 243; *Mercer County v. Hackett*, 68 id. (1 Wall.) 83; *U. S. v. Muscatine*, 75 id. (8 Wall.) 575; *Pine Grove v. Talcum*, 86 id. (19 Wall.) 666; *Oates v. National Bank*, 100 id. 239; *Brooklyn Ry. v. Nat'l Bank*, 102 id. 14; *Burgess v. Seligman*, 107 id. 20; *Poma v. Fowler*, id. 529).

Questions relating to the law of evidence, except as qualified by an actual State statute, covering the particular matter in hand, are regarded as questions of general law as to which the Federal courts will follow their own independent judgment, irrespective of the decision of the State court. While conceding that Federal courts must enforce the provisions of the local statute of the state in which the action arises, unless that statute be in conflict with some law of the United States, we nevertheless insist it to be the law that the decisions of a State court construing common law rules

of evidence are not obligatory upon the Federal courts, that the Federal courts will not be governed by such decisions when they appear to be at variance with the great weight of authority, and that generally the decisions of the State court are not controlling upon the Federal courts as to questions relating to the law of evidence (*U. P. Ry. v. Yates*, 79 Fed. 584; *Chicago etc. Ry. Co. v. Kendel*, 167 id. 62; *Young v. Lowry*, 192 id. 825; *First Natl. Bank v. Liewer*, 187 id. 16; *Chicago etc. Ry. v. Price*, 97 id. 423; *Hemingway v. Ill. Central Ry.*, 114 id. 843; *Van Vleet v. Sledge*, 45 id. 743; *North-ern Natl. Bank v. Hoopes*, 98 id. 935).

Thus, in *Guernsey v. Imperial Bank*, the Circuit Court of Appeals, for the Eighth Circuit, speaking through Judge Sanborn declared:

“It is the duty of Federal Courts which they may not renounce, to form independent opinions and to render independent judgments upon questions of commercial law, of general law, and of right under the Constitution and laws of the Nation. Every citizen of the United States who has the right to prosecute his suit in a federal court, has also the right to the independent opinion and decision of that Court upon every determining question of commercial or general law which he presents for its consideration.”

Guernsey v. Imperial Bk., 188 Fed. 300.

And see, also:

Trieste Co. v. Friedman, 169 id. 1.

7. The Lower Court Erred in Preventing Evidence of the Exclusion of Imperial Valley Dairy Products from Los Angeles.

It has heretofore in our general statement of this case been pointed out that Mr. Skinner was no more

progressive or advanced, in the matter of sanitary dairy conditions, than his fellow-dairymen of Imperial Valley. The evidence shows Mr. Skinner to be upon a par with the other dairymen, at least until the end of 1913 or the beginning of 1914: it shows that he was content to follow their methods: it showed no effort upon his part to improve upon the usual local conditions; and it showed an attitude so unsympathetic to improvement that the expenditure of even ten dollars for better sanitation was not countenanced. Not only, then, was Mr. Skinner content to share the primitive conceptions of his fellow-dairymen, but his insensibility to his sanitary responsibilities was fully reflected in the insanitary condition of his premises and his cattle; and this phase of the matter has also been discussed in our general statement of the case. These things being so, the dairy conditions in Imperial Valley, during the year 1914, were such that milk and dairy products were not permitted to be shipped from Imperial Valley to Los Angeles City for consumption (Assignments 36, 74): in view of the disclosures of this record, it would have been extraordinary if such shipment were permitted; but when this plaintiff in error sought to show this condition of fact, it was prevented from doing so.

The plaintiff in error made two attempts in this direction, but these attempts were made under different conditions. The first occurred during the direct examination of Dr. Hart, who was entirely familiar with the facts, being the Los Angeles City veterinarian, a position which he had held for six years at the time of the trial, and a professional gentleman whose qualifications

were conceded (189-190). Dr. Hart was asked whether, during 1914, milk or any other dairy products from Imperial Valley were permitted by the City of Los Angeles to be shipped there for consumption; and the solitary objection that was made to this inquiry was the stereotyped futility "incompetent, irrelevant and immaterial". No other, different or additional objection was presented; beyond this useless generality, no reason was given to justify the exclusion of this evidence; and we need not repeat here what we have already said as to the inefficiency of such an objection. The evidence was, however, excluded.

The second attempt occurred during the cross-examination of the plaintiff's witness Nye; and the ruling repelling the attempt was, we think, more erroneous, if possible, than that made during the testimony of Dr. Hart. Mr. Nye had been an inspector for the State Dairy Bureau: his duties included the inspection of the sanitary condition of dairies: he had visited Mr. Skinner's dairy; and he declared that "the sanitary condition of that dairy was good" (263). Contrary to other witnesses, he never found a mudhole in the corrals or around the buildings, the barn was clean, the water holes were so arranged that cattle could drink from them without getting into them, "and the water was "as clear as we have ever been able to get water in "the Imperial Valley" (263). He then indulges in the merely negative statement that he never saw any stock or foreign matter in the ponds of any description,—a statement perfectly consistent with the presence of animals and foreign matter in the "ponds", and a state-

ment which by no means establishes that no cattle or foreign matter got into the "ponds", especially since Mr. Nye had never visited Mr. Skinner's premises prior to September, 1914 (263). And he tells us that the milking machine was "always clean and sweet smelling", although Skinner himself tells us that in October, 1914, when Reed and Briggs were there, "the machine had gotten dirty" (129), and although Nye himself tells us he was upon the Skinner premises "about the middle of October, 1914" (263); and he states that the other utensils also "were always clean and sweet smelling" (263-4), although we know from Skinner, Reed, et al., that the only washing they ever got was in the bacteria-tainted water from the Colorado river. Mr. Nye is, however, constrained to admit that the cows "once in a while" would be "a little muddy" (264): that "a cement floor does make the dairy that much cleaner" (id.): that "if they milk cows in the yard, and only "clean the droppings out once a month, that would not "be a sanitary dairy" (id.: compare, for example, Skinner, 152, 157-8): that "it is more sanitary when "they have a wooden or cement floor: a cement floor is "considered the most sanitary" (id.): that stanchions "are an advantage or benefit to a dairy barn, whether "you use a milking machine or not" (id.); and that he "would not consider a dairy which had a mudhole a "sanitary dairy" (265: compare, for example, Reed, 238).

This hurried résumé of Mr. Nye's testimony will, we think, throw light upon the ruling complained of. Mr. Nye was produced to support Mr. Skinner's claim that

the sanitary condition of his dairy was good: beyond that sanitary condition, Mr. Nye did not attempt to go; upon cross-examination he was asked whether the dairy conditions in Imperial Valley, during 1914, were not such that milk and dairy products from there were not permitted to be shipped into Los Angeles City for consumption; and the solitary objections made to this inquiry were “incompetent, irrelevant and immaterial and not proper cross-examination” (264). These objections were sustained and the evidence excluded.

This review shows, we venture to think, that, in the case of Dr. Hart, the sole inquiry is whether the proposed evidence was “incompetent, irrelevant and immaterial”, whatever that phrase may mean; and in the case of Mr. Nye whether, assuming that the proposed evidence was not “incompetent, irrelevant and immaterial”, it was, bearing in mind the character and scope of his direct examination, “proper cross-examination”. No new ground of objection can now be imported into this situation, and the rulings of the learned judge below must, we submit, stand or fall upon the record as made and presented.

So far as concerns the objection “incompetent, irrelevant and immaterial”—the only objection made to Dr. Hart’s testimony,—we beg leave to recur to the views of Justice Field and the other Federal Judges already referred to, and also to point out that no specification was attempted to indicate wherein the proposed evidence was incompetent or irrelevant or immaterial; and we submit that an objection in this form is wholly insufficient, and neither preserves nor presents any ques-

tion whatever for review. And that judicial condemnation of this form of objection is quite general, see:

- 1 Wigmore, Evid.*, sec. 18, and cases cited;
- Parsons v. Beling*, 116 Fed. 877;
- Nassau El. Ry. v. Corliss*, 126 id. 355;
- T. & P. Ry. v. Courtourie*, 135 id. 465;
- State v. Goddard*, Ann. Cas. 1916 A, 146, 149;
- T. & P. R. R. v. Courtourie*, 135 Fed. Rep. 465;
- Clark v. Conway*, 23 Miss. 438;
- Steiner v. Trantum*, 98 Ala. 315;
- City of Abilene v. Cornell University*, 118 Fed. 379;
- Leet v. Wilson*, 24 Cal. 398;
- Fowler v. Wallace*, 131 Ind. 347;
- Penn Co. v. Horton*, 132 Ind. 189;
- Kernochen v. El. Ry.*, 128 N. Y. 859;
- Jones v. Angel*, 95 Ind. 376;
- Rush v. French*, 1 Ariz. 99;
- Alcorn v. Ry.*, 108 Mo. 81;
- Voorman v. Voight*, 46 Cal. 397;
- McClusky v. Davis*, 8 Ind. App. 190;
- Lake Erie etc. Ry. v. Parker*, 94 Ind. 91;
- Glenville v. Ry.*, 51 Miss. 629;
- Schlereth v. Mo. Pac. Ry.*, 115 Mo. 87;
- Fox v. Packing Co.*, 70 S. W. (Mo.) 164;
- Randall v. Ry.*, 76 S. W. (Mo.) 493;
- Bannister v. Campbell*, 138 Cal. 455;
- Central Lumber Co. v. Kelter*, 201 Ill. 503;
- Wilson v. Harnett*, 75 P. R. (Colo.) 395;
- Brown v. Shintz*, 203 Ill. 136;

Hamilton v. Mondota Co., 120 Ia. 147;
Citizens Mfg. Co. v. Whippie, 69 N. E. (Ind.) 557;
Brier v. Davis, 96 N. W. (Ia.) 983;
Gayle v. Mo. Co., 177 Mo. 427;
Enrich v. Gilbert Mfg. Co., 35 So. (Ala.) 322;
Hoodless v. Jernigan, 35 So. (Fla.) 656;
Thuis v. Vincennes, 73 N. E. (Ind.) 141;
In re Inboden, 86 S. W. (Mo.) 263;
Lorgan v. Weltmer, 180 Mo. 322;
George v. St. Joseph, 71 S. W. 110;
Loeser v. Jergenson, 100 N. W. (Mich.) 450;
Lyons v. Grand Rapids, 121 Wis. 609;
Enid Ry. v. Wiley, 78 P. R. 96.

Even, however, if this objection could be considered, it would still be true that the lower court erred: because, as observed in *Holmes v. Goldsmith*, 147 U. S. 150, 164,

“As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances, the more correct their judgment is likely to be. The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inference it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth. The modern tendency, both of legislation and of the decisions of the courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused.”

Indeed, in an earlier case, in the same court, the principle was recognized that

“if the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury.”

Ins. Co. v. Weide, 78 U. S. (11 Wall.) 438.

And in this State, also, full recognition is given to the tendency of modern decisions to admit any evidence which may have a tendency to illustrate or throw light on the transaction in controversy, leaving the strength of such tendency to be determined by the jury; and it is also recognized

“Probability is an element which addresses itself to the reason, and is frequently invoked in matters of human conduct and experience for determining the existence or nonexistence of a fact.” In civil cases a jury is authorized to determine an issue of fact as its probability or improbability may appear to them from the evidence before them.”

Moody v. Peirano, 4 Cal. App. 411, 420: rehearing in Supreme Court denied by latter court January 17, 1907.

In the light of these views, if the dairy conditions in Imperial Valley (some knowledge of which we have acquired in this case) were such that the City of Los Angeles prohibited the consumption of dairy products from that valley, will it be said that this most significant fact does not “tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth” (*Holmes v. Goldsmith*, *supra*)? Does not this Los Angeles prohibition throw light upon the situation in

controversy; and does it not bear directly upon the probability or improbability of insanitary conditions in Imperial Valley? What motive, indeed, other than the preservation of the health of her citizens, would have induced Los Angeles to bar out dairy products from Imperial Valley? And if the conditions, environment and methods of the dairymen there were insanitary, as the defendant company contends they were, then, “according to the common experience of mankind” (*Smith v. U. S.*, 161 U. S. 85, 88), no more significant commentary thereon could well be imagined than this very Los Angeles prohibition.

In every problem involving the admissibility of evidence, two factors are concerned, namely, the proposition to be established, and the material evidencing the proposition: the sole object and purpose of bringing forward the second of these factors is to convince the tribunal of the reality of the first; and the essential, governing principle controlling this subject is that all facts having probative value—“even in a slight degree” or “remotely” (*Holmes v. Goldsmith*, *supra*)—are admissible, unless some specific exclusionary rule forbids. In other words, there is no mystery about the rules of evidence: they do not normally depart from the generally accepted processes of reasoning in ordinary life; and when any unusual or abnormal exclusionary rule is sought to be applied to a pending controversy, the burden of justifying such exclusionary rule must be assumed and sustained by those who would champion the applicability of the rule. Will any one declare, and expect his declaration to be taken seriously, that, accord-

ing to the usual processes of reasoning in ordinary life, the public act of Los Angeles in barring Imperial Valley dairy products because of dairy conditions in the latter place, would not tend, “even in a slight “degree” (*Holmes v. Goldsmith*, supra), to convince the tribunal (the jury of men accustomed to the usual modes of reasoning in ordinary life) of the reality of the defendant company’s contention that those dairy conditions were insanitary?

And what gives additional value and probative force to the rejected evidence is the very fact that the exclusion from Los Angeles of Imperial Valley dairy products because of Imperial Valley dairy conditions, was a public act of Los Angeles. This very public nature of the Los Angeles act is in itself a guarantee of the trustworthiness of the evidence: such public acts are the direct product of the exercise of the governmental function of conserving the health of the citizen, and consequently are required by law (Const. Cal., Art. XI, sec. 11): such public acts are of public interest, concern and notoriety; and such public acts are performed under the sanction of official oaths and the obligations of official duty. And every argument which supports the admissibility of public writings, also supports the admissibility of public acts of this character: indeed, Taylor (*Evid.*, sec. 1479) and Greenleaf (*Vol.* 1, sec. 470), define public documents to be “acts of “public functionaries in the executive, legislative and judicial departments of government—including under this general head, the transactions which official persons are required to enter in books or registers in the

course of their public duties, and which occur within the circle of their own personal knowledge and observation". It may be added that, in an Oregon case, the rule was recognized that common or general reputation may be received concerning a matter in which the public have an interest, or which directly concerns the mass of the people of a town or locality (*Morse v. Whitcomb*, 135 A. S. R. 832).

We submit, therefore, that the mere claim that the proposed evidence was "incompetent, irrelevant and "immaterial", was wholly insufficient to justify the rejection of the evidence: no objection was urged against its technical propriety or its probative quality; and if admitted that it would not have been without effect in the jury room, no one familiar with the customary processes of reasoning would deny.

And when we turn to the testimony of Mr. Nye, additional considerations present themselves. In Dr. Hall's case, the inquiry was presented on his direct examination: in Mr. Nye's case the inquiry was part of the cross-examination of a witness who appeared to advocate, and who attempted to advocate, the superior sanitary condition of Mr. Skinner's premises. But

"the rule that the cross-examination must be limited to the scope of the direct does not mean that the cross-examination shall consist of a mere categorical review of the identical matters testified to by the witness, but merely that new subjects are not to be introduced, and where the direct examination opens a general subject, the cross-examination may go into any phase of that subject. Accordingly the witness may be cross-examined as to matters pertinent to and growing out of or connected with matters elicited on his direct examination, and which

tend to modify, explain, contradict, or rebut his statements on his direct examination, or as to declarations or conduct naturally tending to show the improbability of statements made in the examination in chief”.

40 Cyc. 2507 (IV).

And in the State of California, the rule, as to liberality of cross-examination is very broad. The matter is one of statutory regulation; and Section 2048 of the California Code of Civil Procedure provides that a witness may be cross-examined, not only as to any facts stated in his direct examination, but also as to any facts “*connected*” with the facts stated in his direct examination: but no limitation is put upon the “*connection*”—if there be any “*connection*”, whether direct or indirect, proximate or remote, the right of cross-examination extends to the fact so “*connected*”. And the Supreme Court of the State in dealing with this matter of cross-examination recognizes the rule of great liberality. In *Clark v. Clark*, 133 Cal. 667, the court remarked, on page 672, that

“as cross-examination affords the most effective mode of testing the accuracy and credibility of a witness, great liberality should be allowed as to all facts and circumstances *connected* with the matters stated in direct-examination”:

In *People v. Westlake*, 124 Cal. 452, 459, it was pointed out that

“the power of cross-examination is one of the most efficacious tests which is known to the law for the discovery of truth. * * * It is always proper to cross-examine a witness fully as to all facts and circumstances *connected* with the matters stated in his direct examination. This rule in substance has been adopted by this court in many cases”.

In *People v. Dole*, 122 Cal. 486, 491, it was ruled that

“any fact may be called out on cross-examination which a jury might deem inconsistent with the direct testimony of a witness”;

and see, also, among many other cases which might be cited: *Estate of Kasson*, 127 Cal. 496, and *McFadden v. Santa Ana Ry.*, 87 id. 464. In *People v. Gordan*, 103 Cal. 568, 574, the court took the ground that where a witness who has testified to the general character of a person is the subject of cross-examination, he may then be asked, with a view to test the value of his testimony, as to particular facts—having testified as to the defendant’s general good character, his opinion, and the value of it, may be tested by asking the witness on cross-examination whether he has ever heard that the person in question has been accused of doing acts wholly inconsistent with the character which he has attributed to him; and the doctrine of this case has been approved and followed in *People v. Burke*, 18 Cal. App. 72, 88-9, and *Jung Quey v. U. S.*, 222 Fed. 766, 771. But Mr. Nye took the witness stand to swear to, and he did swear to, the general good character of Mr. Skinner’s dairy so far as its sanitary condition was concerned: why, on cross-examination, should not his opinion, and the value of it, be tested by asking him whether it was not the fact that dairy products from Imperial Valley were barred from consumption in Los Angeles, because of Imperial Valley dairy conditions? What is there in the underlying principle of the thing to inhibit such an inquiry on cross-examination?

In a word, where a general subject-matter, such as the sanitary condition of an Imperial Valley dairy, has

been developed during the examination in chief, the cross-examiner may ask any question relating to that general subject-matter, and is not bound to pursue the line of examination adopted by his adversary; and the general rule requiring testimony to be confined to the point in issue is much more liberally construed during the cross-examination than during the direct. The cross-examiner neither produces nor vouches for the witness; and it is among the commonplaces of the law that, for the purpose of testing the witness, the cross-examiner may develop the relation of the witness to the parties, his relation to and familiarity with the subject of the litigation and that phase thereof as to which he is called, his interest, motives, inclinations and prejudices, his knowledge and means of knowledge, his user of his knowledge, his capacity to observe and his ability to remember and reproduce. The rule limiting inquiry to the general subject-matter of the direct examination should never, we submit, be so construed as to defeat the real object of cross-examination: because one of the objects of cross-examination is to elicit the whole truth about the given subject-matter; and consequently, inquiries intended to fill up designed or accidental omissions, or to call out facts tending to contradict, explain or modify the position taken by the witness on direct, are legitimate cross-examination (*Gilmer v. Highley*, 110 U. S. 47: *People v. Russell*, 46 Cal. 121: *Graham v. Larimer*, 83 id. 173: *People v. Bidleman*, 104 id. 608). Hence, it is not too much to say that, although the *nisi prius* court may exercise a reasonable discretion in regulating the cross-examination, yet it is clearly error to exclude cross-examination that is

responsive to a subject-matter included in the direct examination (*Eames v. Kaiser*, 142 U. S. 488: *People v. Dixon*, 94 Cal. 255: *Storm v. U. S.*, 94 U. S. 76).

8. The Court Erred in Overruling the objections of the Defendant Company to the Hypothetical Question Addressed on Cross-Examination to Dr. Hart.

Assignment 37.

During the cross-examination of Dr. Hart, a hypothetical question was addressed to him. This question was objected to as "incompetent, irrelevant and immaterial, "and assuming conditions not pertinent and not in "evidence" (203-206): these objections were overruled, and of this ruling, complaint is made by the plaintiff in error (assignment 37). In this connection, it is submitted by the plaintiff in error that this hypothetical question fails to respond to the evidence adduced, presents a distorted and incomplete delineation to the witness, is replete with assumptions of unproved facts, and even as to matters which it attempts to state, can only be described as inaccurate. Some illustrations of these defects may be exhibited.

This alleged hypothetical question commences with a reference to "a healthy herd of some ninety dairy "cows, all of which had been entirely free from the "garget since the herd had been collected" (203). A reference to the testimony of Mr. Skinner will show, however, that this statement is a departure from the state of things indicated by the record. On cross-examination, Mr. Skinner was asked whether he did not state to Mr. Reed that, before he purchased the mechanical

milker at all, he had had some garget among his cows; and he replied that he did not. He was then asked as to his degree of certainty on this subject, and he responded to that with a long explanation as to the meaning of the term garget, from which it appears that it was such an affection as might induce swelling and puffing out of a cow's bag. It further appears that, when an animal is suffering from garget, the milk is not good, but is thick and has blood stains in it. In the course of this explanation, Mr. Skinner admitted, "*I had had cows that had garget, as I understand it, before I used the milking machine*" (150); and after some further pressing upon the subject, Mr. Skinner admitted that he might have stated to Mr. Reed that he had had garget among his animals (151). When, therefore, this hypothetical question undertook to assert that all of the plaintiff's ninety cows had been entirely free from garget since the herd had been collected, it undertook to state something which, according to Skinner's own testimony, was not the fact, and was wholly unsupported by the testimony in the record.

Again, in this hypothetical question, at various places, reference is made to what is called "an expert operator". One assumes that this expression is intended to refer to Mr. Reed: but one looks in vain throughout the record, up to the time this question was propounded to Dr. Hart, for any evidence to establish the proposition of fact that Mr. Reed, although an installer of these machines was, nevertheless, "an expert" operator. Indeed, if we are to accept Mr. Skinner's general story to be true, it must be plain to ordinary apprehension

that Mr. Reed was not much of an expert; and indeed, the contrast between Mr. Reed and Mr. Briggs is emphasized by the testimony of Mr. Skinner as given on page 132 of the record. At that place, Mr. Skinner tells us that Mr. Briggs asked him if he had any preference as to what man should be sent to operate the machine, and Skinner replied by saying, "you will do". Thereupon Briggs remarked that he could not do it, that he was too high-priced a man, and that the company would not leave him there anyhow; and Briggs suggested, "how will Reed do"? There is here, we submit, an obvious distinction suggested between Briggs and Reed: Briggs seemed to be, according to this testimony, a man in a class above Reed: one who was too high-priced to waste his time in operating a machine: one whom the company would not leave in Imperial Valley anyhow; and a man who was not in a position to waste time upon work which Reed might do. So far as Mr. Skinner himself is concerned, he tells us, "I did not consider Mr. Reed in it at all" (136), when speaking about arrangements for paying Reed for the time he should be in Imperial Valley; and we know that after Reed did come to Imperial Valley he was so little of an expert, that he "had Mr. Cram, a veterinarian call in to examine my cows" (152). In view of these references in the record, prior to the asking of this question, and in view of the absence of any direct testimony ascribing to Mr. Reed any superior capacity as an operator of milking machines, we respectfully insist that the assumption in this question that Mr. Reed was an expert operator, is wholly unsupported by the testimony.

This objectionable question then goes on to say that the "expert operator", after installing the machine, instructed the plaintiff, his son, and hired man in its care and operation, until he pronounced the machine properly installed and adjusted and plaintiff and his milkers "proficient in the operation of the machine": upon what passage in the record in this case can this defendant in error put his finger to support the statement that Mr. Reed, or any other "expert operator" pronounced the plaintiff and his milkers "proficient in the operation of the machine"? We have been unable, after a careful examination of the record, to find any testimony whatever which supports any such pronouncement by any "expert operator" whatever. On page 118 of the record, Mr. Skinner, speaking of Mr. Reed, states, "he installed the machine and proceeded to run it, "started it and got it to going; and after the machine "was installed and we got everything going, he said " *he thought* the boys could run it all right *with my help and with assistance from the printed literature he had left there with the different instructions he left*"; and if we stop here, without going any further, the criticism which we should make upon this passage is that so far from pronouncing Skinner and his milkers "proficient" in the operation of the machine, this "expert operator" was himself in that condition of uncertainty upon the subject that he merely "*thought*" that the boys could run it all right, not by themselves at all, but with Skinner's help and with the further assistance which might be intellectually derived from the printed literature and the different instructions. Mrs. Skinner's views upon this topic are, however,

somewhat different from those of her husband. She does not pretend to say that Mr. Reed pronounced young Skinner and Harvey Allen “proficient” in the operation of the machine; nor does she dispute the lack of certainty in Mr. Reed’s mind, because she, too, tells us that Mr. Reed “*thought*” that these inexperienced boys were capable of operating the milker (170): but she says nothing whatever about Mr. Skinner’s own help in the matter, nor does she refer either to any printed literature or to any instructions which might have been left,—her entire contribution to this phase of the controversy consists in the statement that “at the time he (Reed) left he said he *thought* they (“our son and Harvey Allen”) were perfectly capable of “running it” (170). Nor is this all: Mr. Skinner himself eliminates his own help in the operation of this machine, and also eliminates the literature to which he refers on page 118, of the record, and somewhat apologetically states, speaking of his son and Harvey Allen, that “*all that they knew about the machine*” was the instructions they received from the book of instructions that the company furnished and from Mr. Reed (145). So that, while on page 118, Mr. Skinner tells us that Mr. Reed “thought the boys could run it all right with my help”, yet, at page 145 he tells us that “all that they knew about the machine were the instructions received from the book and from Mr. Reed”. And this view of the relations between these milkers and this machine receives support from the testimony of Aubrey Skinner, son of the plaintiff. Aubrey Skinner makes more than one statement as to the source from which he received his instructions relative

to this machine: his primary declaration was, "I got "my instructions from my father" (166): in the next breath, he tells us that "Reed instructed us"; and that "at the time he went away he said he *thought* we were "all right". Evidently, the first thought in young Skinner's mind was one which depreciated the Reed instructions: evidently the primary thought in young Skinner's mind was that he had received his instructions, not from Reed at all, but from his father; and we know from Skinner's own testimony, (*passim*) that he was very far, indeed, from being "proficient" in the operation or care of the machine. These references to the record show, we think, the absence of any foundation whatever for the claim that Mr. Reed ever at any time pronounced Skinner or his milkers "proficient" in the operation of the machine: Reed himself nowhere makes any such claim of "proficiency"; and the statement that Mr. Reed did this, is a sheer assumption unsupported by any evidence in the record which we have been able to discover.

Again: it is asserted in this alleged hypothetical question that "the machine was cared for"; but, bearing in mind the general insanitary conditions of the Skinner premises as exhibited even by Skinner himself; bearing in mind that the only water used in connection with the machine, or its parts, was the tainted water of the Colorado river; and bearing in mind Skinner's own confession that as late as October, 1914, "the machine had "gotten dirty" (129), we fail to see upon what evidence this assertion of fact is supposed to rest. One would suppose that the caring for a machine would

include intelligent cleanliness: but what witness in this cause has testified to the application of any intelligent cleanliness to this machine? The farthest in that direction that the evidence carries us is that the teat cups were washed—not sterilized; but the damning fact remains that the water with which they were washed was the same tainted water in which Skinner's cows were permitted to wade and out of which Skinner's cows were permitted to quench their thirst,—the same water that Nye apologized for. (263)

Again: it is asserted in this question that the machine “was cared for and operated in accordance with the “instructions furnished by the defendant company”: but what concrete fact sustains this assertion? Mr. Skinner's testimony, as contained on pages 148-9 of the record, exhibits a conspicuously disoriented perplexity as to the instructions themselves; and Aubrey Skinner (169) explains that “by following instructions, “I mean we did what Reed told us *and I saw in the “book there,”*—in other words, the instructions furnished by the defendant company were subjected to the vagaries of construction which might be put upon them by this inexperienced lad of 21 years, and were spelled out by this lad from what he “saw in the book there”. When we consider that among the “Conditions of Sale”, subject to which this machine was sold, there was the special requirement, not to mention others, “that all reasonable precautions tending to the production of “clean milk be observed” (114), and when we recall that Mr. Skinner's anxiety for the observing of all reasonable precautions tending to the production of clean

milk was so keen that even for the purpose of improving the sanitary condition of his milking barn by placing a floor in it "I would not give a man ten dollars to go and "install one" (142), that he "never washed or cleaned "the teat cups between one cow and another at any "time; after I milked the cow, I did not clean the teat "cups before I put them on another cow" (150), that "I did not have a veterinary at my place before I purchased the machine to see my cows" (150), that "if "any veterinary visited my yard during the year 1914, "for the purpose of examining the cows or taking "extracts of milk, I did not know it" (152), that "I "never had any of the milk examined by any of the "veterinaries" (160), that "I never had any veterinary "make any bacteriological analysis of any of the milk" (161), that "all of the water in Imperial Valley comes "from a common source, the Colorado river" (153), that "most of the cows drank out of the ditch—out of "the irrigation ditch. A great many of them walked "right into the ditch, and when they walked into the "ditch the cow's udders and teats would get into the "water" (154), that "when it rained, the cows walked "around in the mud" (155), that "I took my water from "this same common source of water supply" (155), that sick cows were not isolated "but were left in the "corral with the rest of them" (167), and that, as Reed remarks, "I remember making a statement that the "gutters were not fixed right, did not run off right, and "that it was an awful dirty place; and it was a dirty "place" (238),—when we retain vividly in mind these various elements of the situation upon Skinner's premises during the times referred to in the record, how can

we say, as this alleged hypothetical question asserts, that this machine was cared for and operated in accordance with instructions furnished by the company? How can any fair man honestly say that this history, only some of which we have here hastily produced, establishes that “all reasonable precautions tending to “the production of clean milk” (114) were observed?

It is then asserted that after the machine had been used for about thirty days, the cows began developing swollen quarters: but the evidence upon this subject-matter is quite without clarity. At page 120, Mr. Skinner tells us that “up to June 25th, none of the “cows had sustained any permanent injury”, which suggests that, since the machine was installed in February, the condition of the cows, during the month of March, could not have been at all bad. When, however, we turn to the testimony of Aubrey Skinner and his mother, we scarcely know what to think. Aubrey tells us that about a month after he commenced operating the mechanical milker the cows started to come in with, not swollen, but “hard quarters” (166): on cross-examination, however, he speaks of the cows beginning to have swollen quarters for the first time in about a month after they began milking with the milking machine. His mother, on page 171, tells us that about a month or six weeks after the milker was put on the cows, “I noticed the swollen quarters—hard quarters”; and a little further down upon the same page, she gives a new turn to the story by speaking of “hard *and* “swollen quarters”. From all this, coming as it did from the plaintiff’s own side of this case, it is indeed,

extremely difficult to determine just what the fact was; and we think that in view of these declarations of these witnesses, it would have been much more fair to have exhibited the fact just as it was described in the testimony, rather than to reject one characterization, and arbitrarily adopt the other.

Then came another statement of fact entirely unsupported by the evidence—a plain assumption of a fact which there was no evidence whatever to support. It will be remembered that the answer in the cause set up as a special defense the insanitary conditions prevailing upon the Skinner premises, and that the testimony of Skinner himself, carefully read and equally carefully analysed, shows the substantial truth of this special defense; and some of the discoveries developed in this behalf have been attempted to be collected in the general statement of the case which we have heretofore made. From the beginning of the trial until the moment when this objectionable hypothetical question was presented to Dr. Hart, no declaration fell from the lips of Mr. Skinner or his wife or son, or from any other witness in the cause, declaring in plain terms that the Skinner dairy was clean: on the contrary, all of the testimony pointed the other way. From the beginning of the trial up to the moment when this hypothetical question was asked from Dr. Hart, neither Mr. Skinner, nor his wife, nor his son, nor any other witness, testified that during June, 1914, upon the arrival of either Mr. Reed or Mr. Briggs upon the plaintiff's ranch, either of them thoroughly disinfected the machine, and thoroughly disinfected the premises: nowhere can a scrap of evidence

be found to justify or support this bald assumption. And in view of the state of the pleadings, and the condition of the evidence, this assumption of unproved fact was most material and important. Moreover, the claim of Mr. Skinner, and his witnesses, upon the whole case, was that the Skinner premises were in good sanitary condition: but what makes this assumption of unproved fact all the more reprehensible is the obvious suggestion that if the theory of Mr. Skinner and his other witnesses upon the whole case be sound, in other words, if the Skinner premises were in good sanitary condition, then, plainly no necessity whatever would exist for this asserted disinfecting of the machine and premises. Notwithstanding all this, however, this, like other unsupported assertions, not only suggested a distorted picture to the witness, but also, unfortunately, suggested to the learned court below no reason why this hypothetical question should not be asked. And the seriousness of this gratuitous assumption is manifested by another consideration, viz, that if the premises were disinfected, injury to the cows of the infectious character claimed by the defendant company could hardly, it would be argued both in court and jury room, be attributed to premises which had just been disinfected, but must be attributed to some other instrumentality; and since the Skinner claim reiterated in this hypothetical question itself was that he "had a healthy herd of some ninety " dairy cows, all of which had been entirely free from " garget since the herd had been collected" (203), and since no infection could arise from the recently disinfected premises, the obvious conclusion would be disastrous to the only other instrumentality left, viz: the

mechanical milker. In view of all of these considerations, we earnestly urge that permitting this hypothetical question, under these circumstances, to be asked and answered, was plainly and unmistakably reversible error.

Another assumption contained in this hypothetical question against which we protest as being unsupported by the evidence, is the claim of aggravated and intense swellings appearing in the cows after June, 1914. The facts are that, as Mr. Skinner tells us on page 120, up to practically the end of June, no permanent injury had been done to the cows: we know that the milker was not in operation from July 7th, to October 20th (122, 172); and "after October, seven of the cows were hurt " and some of them injured" (130), or, as Mrs. Skinner puts it, "Reed operated it (the machine) from October " 7th until just after Christmas; and while the machine " was being operated, something like seven or eight " cows, I think, of swollen quarters developed; during " that time no new cases of swollen quarters developed " among the two strings that were being milked by " him" (173). If these statements of these witnesses correctly represent the fact, one fails to see any foundation for the claim of aggravated and intense swelling. Mr. Skinner, indeed, draws a distinction between cows that were "hurt" and cows that were "injured": just what this distinction means, Mr. Skinner does not vouchsafe to explain; but whatever the explanation may or may not be, he presents no claim of aggravated or intense swellings.

This last criticism suggests a brief reference to another statement in this hypothetical question which

we do not conceive to be sustained by the evidence, viz, that the cows operated upon between July and December, 1914, were cows "which had not theretofore shown any "udder trouble" (205): but we know that Skinner's cattle had theretofore been afflicted with udder trouble: we know from his own lips, "I had had cows that had "garget, as I understand it, before I used the milking "machine" (150): we know that "between June 25th "and July 7th, we had fourteen cows in the hospital "as we called it, and then there were more that were "not so bad and were left in the corral with the rest of "them" (167); and in view of these statements, we are unable to understand the basis for the statement made in this question. In this same connection, the hypothetical question claims that "during this two months " (October 20th to December 20, 1914), between eight "and twelve of the cows being milked by the milker "developed swollen quarters": but here, again, we are unable to find evidence to sustain the assertion. The very utmost that can be claimed upon this record is that 7 or 8 only of the cows developed swollen quarters; and we fail to appreciate the fairness of increasing, without proof to sustain it, the number of animals claimed to have been afflicted. At page 167, for example, Aubrey Skinner tells us that "there were seven or "eight that had *hard* quarters—I would not be positive"; on page 173, Mrs. Skinner speaks of "something like 7 or 8 cows, I think, of swollen quarters "developed"; and when we turn to the testimony of Mr. Skinner himself, we find that "after October, 7 of "the cows were hurt and some of them injured",—but beyond this vague statement, one hears nothing to

support the claim made in the hypothetical question. And before leaving this particular branch of the hypothetical question, we wish to protest against the statement therein contained that “of the 60 odd remaining “ cows of the herd being milked during the same period “ by hand, developed no new cases of swollen quarters”: but here, again, we find a conflict between the statements of the hypothetical question, and the statements in the record. This particular assertion of the hypothetical question is specially bad in that it speaks of the remaining cows that were milked during the same period by hand developing no new cases of swollen quarters: but the testimony of Mrs. Skinner makes it plain, we think, that instead of the 60 odd cows being milked by hand, they were milked by Reed operating the machine,—the hypothetical question omitting to show that the mechanical milker was used upon these very 60 odd cows. Mrs. Skinner’s testimony was this: “Reed “ operated it from October until just after Christmas; “ and while the machine was being operated something “ like 7 or 8 cows, I think, of swollen quarters developed; “ during that time no new cases of swollen quarters developed among the two strings that were being milked “ by him” (173); and we submit that this testimony shows plainly when considered not only in itself, but also in the light of the other evidence in the record, that the 60 odd cows referred to in the hypothetical question as having been milked by hand, were not in fact milked by hand, but were milked by the mechanical milker.

Another objection to this hypothetical question as assuming conditions not in evidence, is suggested by the statement that Mr. Skinner’s herd had no swollen

quarters either before or after the user of the machine: but Skinner himself, in plain terms, actually admitted on page 150 that before he used the milking machine at all, he had had cows that had garget—a disease of which swelling is the most prominent symptom. Aubrey Skinner does not say that prior to the advent of the mechanical milker the cows had not suffered from swollen quarters: he confines himself to the very cautious and non-committal negative statement that “prior to the time the milker was put on, I *had not seen* “a swollen quarter *in the cows I had milked*” (168). And upon this topic, Mrs. Skinner contributes nothing.

And finally, not unduly to expand criticism of this hypothetical question, the statement is made, for the purpose of emphasizing the asserted culpability of the mechanical milker, that there was a “rapid” disappearance of swelling when the cows were taken off the machine. The evidence, we think, shows the contrary of this, and in our opinion wholly unauthorizes this claim of rapidity. The testimony of Mr. Skinner, on page 120 of the record, fails to exhibit any “rapid” disappearance of cow trouble, when the cow was removed from the machine: on page 121, he tells us that Reed ran the machine for about two weeks in June-July, 1914, that the cows developed swelling, and that instead of any rapid disappearance of any swelling, “the bags were ruined”: on page 122 he repeats instructions to his hired man, which are entirely inconsistent with the thought of any “rapid” disappearance of swelling: on page 159, in describing the outward (incorrectly printed upward) symptoms of the animals, he

exhibits a condition which no one, we think, would rightly feel to justify a claim of rapid disappearance; and on page 171, Mrs. Skinner speaks of the cows being "ruined". Instead of there being this "rapid" disappearance of swelling when the cows were taken off the machine, it appears from Skinner's story that "before the time when Briggs came, there were 20 cows "ruined" (124): and again, on page 130, he recurs to the thought that "the injured cows were absolutely "ruined for dairy purposes"; and on page 151 he tells us that "there were the 20 cows that were injured in June and July, that had caked bags and showed evidence of pus in the bag". His whole effort was, *inter alia*, to show that when one of these cows would become diseased, "she never would give the same milk any more" (162-3), a statement repeated by his son (166, 168). Putting together all of the testimony upon this subject to be found in the record, some of which we have here referred to, we submit that the statement contained in this hypothetical question as to this alleged "rapid disappearance of swelling" when the cows were taken off the machine, is unsupported by the evidence. The plain object of this statement is, of course, to attribute the swelling directly to the machine: that is the only theory upon which the foregoing numerous departures from the record can be explained: but we submit that no rule of law will justify a hypothetical question which assumes a state of facts which the evidence fails to support.

Nor is this all: this alleged hypothetical question sins not only by excess, but also by defect: it is incomplete

and it omits very material features of the cause which should properly have been brought to the attention of the witness (*Balt. etc. Ry v. Dever*, 112 Md. 296, 313). We do not propose to do more than merely suggest some few of these features, such, for example, as the silence of this question with reference to the intervention of the fourth unit, the bacteria-tainted water, the accumulations of manure, the unchanged pressure and vacuum during the use of the machine, the failure to isolate affected cows, the actual disclosures of the evidence as to the treatment of teat cups, the water or mud holes which the animals were permitted to use, the absence of veterinarian assistance, the condition which compelled Reed to describe the place as “dirty”, and the general disregard of “reasonable precautions tending to the production of clean milk” (114),—a requirement called for by the very “Conditions of Sale”, subject to which the mechanical milker was sold. We do not wish to weary the court by going at length into the absence of material features necessary to a truthful picture of the situation: nor do we attempt to dissect all of the many *unsupported* statements which are contained in this hypothetical question: but we do submit, with great earnestness, taking this hypothetical question as a whole, and dissecting it in the light of the case as made by the evidence, it was clearly reversible error to overrule the defendant company’s objections and permit the question to be answered.

The rules which regulate the presentation of hypothetical questions are so well understood that an extended reference to them will not be necessary. If

there is one rule which is thoroughly well established it is that the question must be based upon facts that the evidence directly, fairly and reasonably tends to establish: for, as the Supreme Court of Nebraska inquired in a case wherein the trial court compelled a hypothetical question to conform to the facts admitted or proved,

“how can an expert give an intelligent opinion upon that point, or one that the jury would be justified in acting upon, unless the inquiry reflects the proof on that question? There must be a fair statement of the case to render the answer of any value whatever, as a partial statement or one founded on mere fiction would not fail to mislead the jury and probably cause a miscarriage of justice. The court did not err, therefore, in its ruling”.

Burgo v. State, 42 N. W. (Neb.) 701, 702.

In a frequently cited Michigan case, it was observed that

“no more important duty is devolved upon trial courts in these cases than to see that these questions are permitted upon the proper basis, and to instruct the jury as to the consideration and weight they should give them”.

Prentis v. Bates, 50 N. W. (Mich.) 637, 644.

And, as was observed by the Supreme Court of Wisconsin,

“Surely, there can be no rule of evidence which will tolerate a hypothetical question to an expert, calling for his opinion in a matter vital to the case, which excludes from his consideration facts already proved by a witness upon whose testimony such hypothetical question is based, when a consideration of such facts by the expert is absolutely essential to enable him to form an intelligent opinion concerning such matter”.

Vosburg v. Putney, 50 N. W. (Wis.) 403, 404.

And, finally, not to be too tedious with State cases, in reversing a judgment for error in permitting a defective hypothetical question, the Supreme Court of Minnesota remarked:

“All hypothetical questions must be based upon facts admitted or established, or which, if controverted, might legitimately be found by the jury by the evidence. Such a question should embody substantially all the facts relating to the subject upon which the opinion of the witness is asked, since the opinion of the witness is worthless, and may be misleading, if given on a state of facts that does not exist, or upon an incomplete statement of the facts bearing upon the subject upon which the opinion of the witness is asked.”

And then, after referring to the evidence in the case, the opinion proceeds:

“The question propounded was based upon an incomplete hypothetical statement of facts. It was also based in part upon a hypothetical fact which was neither admitted nor sustained by any evidence in the cause, to wit: that the defendant knew that the plaintiff had sustained a dislocation of the cervical vertebrae. On the contrary, the evidence is conclusive that the defendant did not know that plaintiff had received any such an injury.”

Wittenberg v. Onsgard, 81 N. W. (Minn.) 14, 15-16.

The view of the law for which we contend finds support in *Raub v. Carpenter*. There, a hypothetical question was asked the witness which was based in part upon undisclosed facts, and assumed the existence of facts for which there was no foundation in the evidence. The lower court sustained an objection to the question, and when the exception came before the Supreme Court, Chief Justice Fuller, in delivering the opinion of the court, said:

“Clearly the opinion of the witness from facts he did not disclose was inadmissible. If he knew anything about the deceased other than what he had stated, which aided him in arriving at a conclusion, that knowledge should have been developed. *In that particular the question assumed the existence of facts for which there was no foundation in the evidence.*”

Raub v. Carpenter, 187 U. S. 159, 161.

And so, likewise, in the more recent case of *Harten v. Loffler*, the same principle was applied, the court, speaking through Mr. Justice Peckham, remarking:

“The exclusion of the evidence of the witness Montague, when called by the defendant with reference to the value of the property, was not error, *because there was absolutely no evidence whatever to support the hypothesis stated in the question.* The question assumed as a fact that the business amounted to \$150 or \$200 a week, and that the realty was worth only \$4,000 with the improvements, the land and buildings on it, and then the question was put, ‘What would be a fair price to pay for that land with the improvements and fixtures, and the liquor license and good will of the business, but not including any of the stock in trade?’ The question assumed the value of the greater portion of the property sold.”

Harten v. Loffler, 212 U. S. 397, 405.

And so, also, in the recent case of *Union Pacific Railway v. McMican*, the Circuit Court of Appeals for the Eighth Circuit, recognized the rule that

“when a hypothetical question is submitted in such a case, it should only embrace facts which have been given in evidence. Such a rule was clearly violated in this case, and for that reason a new trial must be granted. The fact that the witness, when interrogated by the court, stated that in his opinion the question fully covered and represented statements made in evidence and the history of the case as stated to him by plaintiff, did not remove the vice. *It was for the court primarily, and the jury finally, to*

determine whether the question embraced a proper statement of the facts as shown by the evidence, and not for the witness to base his opinion upon partly undisclosed statements. Objections were made to other hypothetical questions to other doctors on the ground that they included facts which were not embraced in the evidence which had been given” * * * “There was nothing in the testimony that indicated that within 24 hours after the accident the abdomen was in a badly swollen condition. Hypothetical questions should not embrace facts not in evidence. While counsel may base a hypothetical question upon his theory of the correctness of conflicting evidence, it is error to embrace facts which are not disclosed by the evidence”.

Union Pacific Ry. v. McMican, 194 Fed. 393-395-6.

And in the case of *Western Assurance Company v. J. H. Mohlman Co.*, 83 Fed. 811, 822, the Circuit Court of Appeals, for the Second Circuit, speaking through Judge Lacombe, stated:

“The only remaining exceptions are to the refusal of the trial judge to allow defendant’s witnesses Cashman and Freel to express an opinion as to ‘how long a fire would burn in the building before the posts would be weakened’, and as to ‘what time would elapse before fire and smoke would appear’. The hypothetical question intended to elicit this information contained, so far as the record shows, no indication as to whereabouts in the building the fire broke out. It is manifest that this is an important—probably the most important—element in the hypothesis, and, without it, any opinion, expert or other, would be mere wild guesswork. The trial judge correctly excluded it.”

And finally, in holding it to be reversible error to admit the answers of expert witnesses to hypothetical questions which assumed the existence of facts of which no evidence is offered, the Circuit Court of

Appeals for the Seventh Circuit, in *North American Accident Association v. Woodson*, 64 Fed. 689, observed, at page 695, that

“This being the kind of case the plaintiff must make out,—that Dr. Kemper had had a fall which had produced extravasation of the blood in the brain,—the importance of the facts detailing the symptoms contained in the hypothetical questions becomes obvious. It is a proposition too simple to require any citation of authorities that the material facts assumed in a hypothetical question must be proven on the trial, or rather that there must be evidence on the trial tending to prove them. Otherwise, it is error to allow them to be answered *How can we say that either the answers to the questions or the verdict of the jury would have been the same if the statements contained in the questions, and not proved, had been omitted?* Evidence of experts who are allowed to give an opinion is always attended with a sufficient degree of uncertainty and danger when founded upon an assumed state of facts which appear on the trial, or which the evidence tends to prove, and which the jury must find proven. If counsel can, in advance of knowing what he will be able to prove on the trial, frame his questions as he pleases, putting into them supposititious statements from his own invention and ingenuity, wholly unsupported by evidence, then the danger of this rather unreliable kind of testimony will be increased a hundred fold;” citing many State authorities.

On the whole, then, reading this hypothetical question in the light of the actual disclosures of the record in this cause, and in the light of the principles of law governing inquiries of this character, we respectfully submit that it was reversible error to overrule the objection of the defendant company to this hypothetical question.

9. The Lower Court Erred in Permitting the Plaintiff Below to Testify in General Terms to His Opinion or Conclusion as to the Amount of his Alleged Loss or Damage in the Quantity or Amount of Milk or Butter Fat, Instead of submitting to the Jury the Data Upon Which He Claimed a Loss, Leaving it to the Jury to Determine Whether There Really was a Loss, and if so, How Great that Loss Was.

Assignments 13, 23, 24.

In this behalf, the record exhibits the following state of affairs:

“Q. Did you suffer any loss as the result of the
“operation of this milker upon your herd in the
“quantity or amount of milk or butter fat you received
“from that herd?

“Mr. PARKE. We object to the question as calling
“for the conclusion of the witness.

“The COURT. Objection overruled.

“Mr. PARKE. Note an exception. And said defend-
“ant, said Sharples Separator Company, a corpora-
“tion, now assigns said ruling as error.

“Exception Number 8.

“The WITNESS. I did. The other cows this milker
“was used on that were not injured went off on their
“milk; the only way I have of getting how much less
“milk they gave is in my cream sheets. These cows
“were injured during the last days of June and the
“first days of July; in June and July my cream check
“dropped \$142.13; it never did go back up again. If
“they had not used this milker the cows would, in
“my opinion, have held up. The milk that I lost by
“reason of this amounts, I think, to \$1500—the
“value of it.

“Said defendant, said Sharples Separator Company,
 “ a corporation, thereupon moved to strike out all of
 “ the testimony of the witness on the value of the milk,
 “ as stating a mere conclusion; said motion was then
 “ and there denied by said court, to which said ruling
 “ defendant Sharples Separator Company, a corpora-
 “ tion, then and there duly excepted, and now assigns
 “ said ruling as error.”

The rule is, of course, elementary that witnesses must state facts, but not conclusions, opinions or conjectures (*Winslow v. Glendale Light and Power Co.*, 164 Cal. 688; *Callahan v. Marshall*, 163 id. 553; *Ferguson v. Hubbell*, 97 N. Y. 507; and cases herein cited elsewhere upon this topic); and the same view is taken in the Federal courts (see some applications of the principle in: *Fort Pitt Gas Co. v. Evansville Contract Co.*, 123 Fed. 63; *Ball v. U. S.*, 147 Fed. 32-37; *Detroit So. Ry. v. Lambert*, 150 Fed. 555). And this general rule is applied to the issue as to damages claimed on account of a loss. Every litigant is entitled, we submit, to have the reasoning of the jury rather than that of the witness, applied to the facts of his case, and a witness cannot invade the province of the jury by giving his opinion or conclusion as to the amount of damage asserted to have arisen from the series of facts upon which the cause of action sued on is sought to be based. Consequently, a witness is not permitted to give his opinion as to the loss or damage which a party claims to have sustained, because when he does so he includes the law as well as the fact. It is the duty of the jury to assess damages according to the rule of law which

it is the province of the court to lay down for their guidance; and witnesses are permitted only to furnish the data from which the amount is arrived at. This rule is thoroughly well established; and the following are some of the cases which sustain it:

- Patterson v. McMinn*, 152 S. W. (Tex.) 223;
International Agricultural Cor. v. Abercrombie,
 49 L. R. A., N. S. 415;
Kraus v. Coffin Co., 123 Ga. 817;
Springfield, etc. Co. v. Warrick, 249, Ill. 470;
Huntington v. Stemen, 37 Ind. App. 553;
Cinn. etc. Co. v. Brandenburg, 142 Ky. 814;
Carter v. Md. etc. Co., 112 Md. 599;
Wiggins v. St. Louis Ry., 119 Mo. App. 492;
Odell v. Storey, 81 Neb. 437;
Raymond v. Edelbrock, 15 N. D. 231;
Montgomery v. Summers, 50 Ore. 259;
Byrne v. Cambria Co., 219 Pa. 217;
Kirk v. Seattle Co., 31 L. R. A., N. S. 991;
Church v. Wilkerson, 137 A. S. R. 1059;
De Wald v. Ingle, 96 id. 927;
Harriman v. New Nonpareil Co., 122 Iowa 616;
St. Louis Co. v. Law, 68 Ark. 218;
McKinnon v. Palen, 62 Minn. 188;
Atchinson, etc. Ry. v. Wilkenson, 55 Kan. 83;
Cochman v. Bowmaster, 73 App. Dec. N. Y. 310;
Van Dusen v. Young, 29 N. Y. 9;
Atlantic Ry. v. Campbell, 64 Amer. Dec. 607;
Green v. Plank, 48 N. Y. 669;
Whitmore v. Bowman, 4 G. Green 148;
Montelius v. Atherton, 6 Colo. 224;

Hurt v. St. Louis Ry., 4 Amer. St. Rep. 374;
Wakeman v. W. & W. Mfg. Co., 54 Amer.
 Rep. 676;
Huston Ry. v. Burke, 40 id. 808;
Freemont Ry. v. Marley, 13 Amer. St. Rep. 482.

When Mr. Skinner undertook to put his milk and/or butter fat loss at \$1500 he was making the wildest kind of a guess: he had no means by which to render "clearly ascertainable" (Cal. Civil Code, sec. 3301) his loss or damage in that regard: he was quite without data from which or by which to determine with any degree of certainty whatever just what his alleged loss or damage was; and these circumstances emphasize the impropriety of permitting him to make a flying guess at the amount. At page 136, he admits in plain terms that "I did not make or keep any record " of the amount of milk obtained from each individual " cow"; and in his bill of particulars, filed in this cause, he concedes that "no record was kept of the " amount of milk each cow gave" (291-2). And so, likewise, with the butter fat: at page 292, he admits that he "has not in his possession at the present time " a record of butter fat given for the preceding year" which would be 1914; and he then proceeds to set forth what purports to be the number of pounds of butter fat for each month during the year 1914, together with the price per pound for each month, except January and February (292-3): but no reliance can be placed upon the figures last referred to for the reason that, on page 138, Mr. Skinner is constrained to admit that "the amount of butter fact that I received each

“ of the months of 1914, as set out in this bill of particulars, and the price at which I sold butter fat those months, is not correct for all the months”. Mr. Skinner omits, however, to explain what is meant by the phrase “all the months”: whether this expression includes the twelve months of the year or any less number, is nowhere made clear; nor is any attempt whatever made to show what month or months, if any, are correctly referred to in the bill of particulars. In other words, Mr. Skinner had no real data illustrative of the loss or damage claimed, and in his statement to the jury, he presented, in opposition to the settled rule of law, a mere conclusion or opinion concerning the loss or damage involved; and since he kept no account of the milk, and since he concedes his butter fat account to be incorrect, it must be obvious, we think, that his mere guess should have been excluded by the learned judge of the court below. As far back as the time of Lord Mansfield (*Carter v. Boehm*, 3 Burr. 1905, 1908), that learned judge said that:

“It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and the jury were to determine the cause; and therefore it is improper and irrelevant in the mouth of a witness;”

and the view for which we are contending is recognized by the Supreme Court of the United States in *Dushane v. Benedict*, 120 U. S. 647, in the following language:

“The court may properly decline to permit one of the plaintiffs to testify in general terms what he estimates the amount of their damages to be, where he has not testified to the items of damage, or to any facts upon which his opinion was based.”

In *Ellwood Planing Co. v. Harting*, 52 N. E. (Ind.) 621, it was pointed out that

“a question is not proper which, in effect, calls upon witnesses to estimate the amount of the damage which should be assessed by the jury, because of the act or omission for which damages are claimed in the action”:

in *Richardson v. City*, 13 Amer. St. Reports, 482, the court declared that

“it is not permissible for a witness to state the amount of damage sustained. He should state the facts within his knowledge and from those facts and other evidence adduced it is for the jury to determine the amount of damage”:

in *Western Union Tel. Co. v. Ring*, 62 Atl. (Md.) 801, it was held that it was improper to permit a witness, against the objection of the defendant, to give in exact figures his estimate or judgment of the damage: in *Ohio, etc. Co. v. Nickless*, 71 Ind. 271, it was declared that the evidence of the plaintiff as to the amount of damage sustained by him was clearly incompetent: in *Springfield, etc. Co. v. Warrick*, *supra*, it was pointed out that

“it is the duty of the jury or of the Court to assess damages on data furnished by witnesses from which the amount of damages should be arrived at”:

in *American Pure Food Co. v. Elliott*, 31 L. R. A., N. S. 910, it was held to be erroneous to permit a party to assess his own damage, and the court observed that

“the party injured cannot be permitted simply to ‘guess at it’ ”,—

precisely what Skinner attempted to do in the cause at bar:

in *Cross v. Coffin Company*, *Supra*, it was held that

“it was not permissible for the witness to state merely in general terms the amount of the damage sustained. He should have given the jury some facts and data from which to estimate the amount of damage. The testimony was nothing more than a conclusion of the witness as to what damage had been sustained. * * * It was the province of the jury to fix the damage from proved facts, and they were not to be controlled by mere conclusion of witnesses as to this matter”:

in *Pac. Live Stock Co. v. Murray*, 76 Pac. 1079, the court pointed out that a witness cannot express an opinion as to the amount of damage sustained, because that is exclusively within the province of the jury, under the instructions of the court; and in *Raymond v. Edelbrock*, supra, it was held that the opinion of the plaintiff as to his damage was clearly incompetent.

We submit, therefore, that in this particular, and it was a most important one, the lower court grievously erred in admitting this incompetent evidence; and since it is wholly impossible to say that the jury was not influenced thereby, it follows, we submit, that a reversal should be ordered.

INSTRUCTIONS TO JURY.

The Charge to the Jury of the Learned Judge in the Cause at Bar Was Confusing, Misleading, Contradictory and Inharmonious: It Wrongfully Assumed the Existence of Controverted Facts; And It Omitted Elements Without Which It Was Impossible for the Jury to Arrive at a Just Determination Concerning the Rights of the Parties Litigant.

We regret the necessity which compels us to criticise the charge given by the learned judge below to the

jury, but we are nevertheless constrained to urge upon this court the proposition that this charge was a most important factor in the development of a verdict which we regard as unjust. In an analysis of this charge, we find the learned judge assuming as proved the very facts that were controverted; we find directions that are confusing, misleading, contradictory and inharmonious; we find undue prominence given to the plaintiff's side of the case; and we find pertinent requests by the defendant denied a place in the charge as given. These general characteristics of the charge are of themselves, as it seems to us, sufficient to condemn it.

The learned judge commences his charge by assuming as established the most vital fact in the case. He tells the jury that "this is an action brought by plaintiff to recover damages for *injuries and losses suffered by him as a result of the operation of a Sharples mechanical milker upon his herd of dairy cows*" (296), thus assuming that losses and injuries were actually suffered by the plaintiff as a result of the operation of the mechanical milker. The defendant company has never admitted that any injuries and losses were suffered by the plaintiff as a result of the operation of the mechanical milker; and upon the issue as to whether any such injuries and losses had actually been suffered by the plaintiff, the defendant company was entitled to take the opinion of the jury, and to take that opinion unbiased by any assumption by the court.

It is elementary that to weigh the evidence and find the facts is the province of the jury: it is for the jury to determine what the evidence shows, because otherwise there would be no excuse for their existence; and consequently no rule of law will justify a court in an invasion of the legitimate province of the constitutional triers of the facts, whether that invasion take the shape of a determination of controverted matters of fact or otherwise. That the plaintiff below did actually suffer injuries and losses as a result of the operation of the mechanical milker, might have been argued to the jury by the plaintiff's counsel, and in that event the defendant company's counsel could have answered upon, at least, equal terms—counsel against counsel: but the weight of the opinion of the court had no place in either scale; and therefore when the learned judge threw the weight of his opinion against the defendant company at the very pivotal point of the contest, by assuming the very injuries and losses which the defendant company controverted, he invaded the province and usurped the function of the jury, and committed grievous error. As observed in a California case,

“The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the court, and the great deference which they pay to the opinions and suggestions of the presiding judge, especially in a closely balanced case, when they can thus shift the responsibility of the decision of an issue from themselves to the court.”

People v. Williams, 17 Cal. 147-8;

and as pointed out by the Supreme Court of Alabama,

“it is of the highest importance in the administration of justice that the court should never invade the province of the jury; should give them no intimation as to his opinion upon the facts, but should leave them wholly unbiased by any such intimation to ascertain the facts for themselves. We cannot shut our eyes to the fact that juries, especially in cases which are strongly litigated upon the facts, watch with anxiety to gather from the court some intimation as to what the judge thinks should be their finding upon the facts.”

Hair v. Little, 28 Ala. 236.

And an apt illustration of the vice of assuming controverted facts in a charge to a jury, will be found in *People v. Lee Chuck*, 74 Cal. 30. In that case the lower court undertook to assume in its charge that the deceased was shot and killed by the defendant: but the record in the case failed to show any such admission on the part of the defense, and no such admission was involved in the theory of the defense; and the court held that because the assumption was not justified by the facts, and because it was in itself favorable to the theory of the prosecution, reversible error was committed.

The learned judge then proceeds to state the issue between the parties, which is done with the accent upon the plaintiff's recovery: the jury are told that if they find the plaintiff's allegations to be true, it will be their duty to find a verdict for the plaintiff; but no alternative is stated, nor is any hint given the jury as to the conditions under which they might find a verdict for the defendant company,—indeed as the charge reads, it seems to take it for granted that plaintiff should and would have the verdict, and that

the possibility of a verdict for the defendant company might well be ignored. Nor, in this connection, is a word said about the burden of proof as one would expect; nor was anything said upon that subject until the court was well along in the charge,—until, indeed, the court was approaching the end of the charge; and while the court told the jury that the burden was upon the plaintiff, yet the assumption was even here indulged that there was an injury to the cows (300-301)—an injury which, throughout the bulk of the charge, is associated by the learned judge with the operation of the mechanical milker.

The primary thought in the mind of the learned judge, the thought to which he gave prominence by formulating it at almost the commencement of the charge, by referring to it at intervals throughout the charge, and by recurring to it near the close of the charge, was the damages which the jury was to allow the plaintiff: but it is significant that nowhere throughout this charge is there the remotest reference to the “Conditions of Sale” which were part of the Exhibit 1 referred to in the charge, and subject to which the machine was sold. It will be remembered that throughout the record the “instructions” are dealt with and spoken of as something distinct from the “Conditions of Sale”: the “Conditions of Sale” were an actual constituent part of the contract of sale (112-114), but the “instructions” were contained, not in the contract of sale, but in printed books, a copy whereof was delivered to Mr. Skinner, but which copy Mr. Skinner rather cavalierly permitted to evaporate (148-9); and

while at certain places in this charge the learned judge refers to the "instructions", he nowhere refers to the "Conditions of Sale", or attempts to accord to them that "special attention" (113) which the contract itself calls for. Bearing these things in mind, what was the primary instruction to the jury upon that subject matter of damages which so quickly attracted judicial attention? It was this, that if the jury found that the cows were injured by the operation of the milker, they should allow plaintiff damages in a sum which would be fair (not something less than full or complete; just) compensation for loss incurred by an effort in good faith to use the machine for milking plaintiff's cows. But, passing for the present the proposition that this is not the true measure of damages in cases of this class, and passing for the present the confusion and misleading contradiction between this direction and later directions upon the same subject, why was it that no reference was here made to the mode of operation of the milker? The whole theory of the sale, the plain letter of the contract of sale, called for compliance with the "instructions" and for "special attention" to the "Conditions of Sale": why were these important factors ignored, condemned as naught by silence, and the jury left free to say that "the operation of the milker", regardless of the conformity of that operation to "instructions" or "Conditions of Sale", was quite enough to authorize damages, if those "injuries and losses" were suffered which the court at the outset of the charge assumed were suffered? We think that if an instruction is to be given to a jury, it should

include the various elements which are relevant to the subject-matter of the instruction; and we believe that the giving of undue prominence to one feature, to the utter disregard of other features equally important, is productive of great injury to a litigant. What, indeed, was the jury to think when it saw such important features ignored as the good mechanical order of the machine, the proper adjustment of pressure and vacuum, the careful and thorough stripping of the cows after each milking, the thorough cleansing of the machine after each milking, and the observance of all reasonable precautions tending to the production of clean milk? What was the jury to think when it was told that the right to damages turned upon the fact that the cows were “injured by the operation of said milker”? The defendant company made no warranty of non-injury at all hazards or under all circumstances: they sold the machine subject to “special attention” being paid to the “Conditions of Sale”; and to tell the jury that damages accrued if the cows were “injured by the operation of said milker”—an injury already assumed by the court itself—is not only to sweep out of the case the defendant company’s special defense and all the evidence supporting it, but to inject into the minds of the jury a new contract upon which the minds of the parties had never met.

But this is not all. Could anything be more confusing, misleading or inharmonious than the position taken by the learned judge upon the subject-matter of the alleged warranty? His view upon this subject

will be found at the bottom of page 297 and the top of page 298; and we believe that it will be found, from an inspection of these two paragraphs, that the learned judge invaded the province of the jury by assuming the existence of the alleged warranty. In the amended complaint, the pleader seeks to allege a warranty: in the answer of the defendant company, denial of any warranty is made; and thus was framed the issue of warranty *vel non*. Why, then, did the learned judge assume the existence of this controverted fact? We are wholly unable to recall any admission whatever, at any time during the trial, made by the defendant company as to this alleged warranty, which would have authorized the learned judge to treat the existence of the asserted warranty as an uncontroverted fact: whether the plaintiff had established sufficient facts and circumstances to cause the reason of the jury to find the existence of the alleged warranty, was fair matter of argument for the counsel of the respective contending parties; but we earnestly submit that the learned judge forsook his judicial position when he assumed to impress upon the jury his private judgment upon this controverted fact, for the reason, if for no other, that the jurors—or some of them—and the judge may have held widely different views concerning the matter.

But mark, moreover, the misleading confusion of the first of these paragraphs. The learned judge refers to the printed documents which plaintiff “says were
“delivered to him by the Sharples Separator Com-
“pany during the negotiations leading up to the sale

“ to him of the Sharples mechanical milker”; and then instructs the jury that “These contained various statements regarding the Sharples mechanical milker, and what it will do, and it is for you to decide from all the evidence whether the warranty has been performed” (297-8). But, not only does this instruction assume the controverted fact of warranty, not only does it assume the existence of some undefined and unidentified “warranty”, but what “warranty” is meant? How was that jury to identify the “warranty” referred to? The “printed documents” were not attached to the contract of sale: they were not in any way connected therewith: there was no proof that these “printed documents” were the “printed matter” mentioned in the contract: to assume that they were would be the wildest of guess-work: there was no proof whatever that, although Hickson “opened” (111) the negotiations, yet he was really a sales agent of the company, or participated in the actual making of the actual contract, or was authorized to bind the company whether by printed matter or otherwise: how was that jury to determine what “warranty” the learned judge had in mind? The learned judge nowhere defines the term “warranty”, or attempts to clear up for the jury its limitations: nowhere does he designate any particular statement in these “printed documents” as being a warranty; and since, as we have already shown, these “printed documents” themselves, so far from being warranties, are merely expectations, hopes as to the future, and dealer’s talk, what success could that jury have while groping about

among them in the vain search for a “warranty”? Is it possible that anything could well have been more confusing or misleading than this?

But the difficulty does not cease here. After having directed the attention of the jury to these “printed documents”, after having treated these documents as containing some nebulous warranty, and after having told the jury to “decide from all the evidence whether “the warranty has been performed”, the learned judge then, in the next breath, tells the jury that the “*only*” warranty to be considered by them is that contained in Plaintiff’s Exhibit 1. What, then, does this mean? No “printed documents” are set forth in, or identified by, Plaintiff’s Exhibit 1: is therefore the “*only*” warranty this, that defects of workmanship and materials are guaranteed against, the machine is in all respects as represented, and it is “*capable*” of doing the work as claimed? Has any intelligent claim been made of any defect of workmanship or materials? And as to the machine, who is there that puts his finger upon any feature of it that is not as represented? And who pretends to say that it is not “*capable*” of doing the work as claimed? If the “*only*” warranty to be considered is “the warranty *contained in* the original “order”, why refer to “printed documents” that are *not* “*contained in*” that original order? And how was that jury to determine by what rule they were to ascertain the rights of the contending parties?

The learned judge then proceeded to quote to the jury two sections of the California Civil Code, but,

unfortunately, did so in such a manner as to leave the jury in added doubt and uncertainty as to the rule which should govern their deliberations; and this condition of things arose from the failure of the learned judge to give the jury even a remote hint as to "the time to which the warranty referred". Even where there is really a warranty, there must be some ascertained point of time when liability under it should cease: normally, a warranty refers to the time of the sale, and, in cases of this impression, is breached then, if breached at all; but why should the learned judge have directed the attention of the jury to "the time to which the warranty referred", but have wholly failed to tell them what that time was? Surely, nothing could well have been more confusing than to leave the jury to its own unaided devices upon such a material matter as this; and of this, plaintiff in error, who was entitled to a clear, systematic, and unconfused statement of the law, has an undoubted right to complain.

The learned judge then told the jury that if they found that there was a warranty that the mechanical milker sold plaintiff "would milk his cows without injury", and that the warranty was broken, they should allow plaintiff damages for all injuries proximately resulting from the operation of the milker, while the milker was being operated in conformity with the instructions of the defendant company. But the defendant company never gave to the plaintiff any warranty that the milker "would milk his cows without injury"; as the learned judge had told the jury, "the only warranty given * * * is the warranty contained in the

“original order”: but that “warranty” merely goes to defects of workmanship or materials, to the presently existing condition of the machine, and to its *capability* of doing the work as claimed in certain unidentified “printed matter”; and even if we import into the situation the printed matter from which at the trial counsel made the selection of the paragraphs printed in the record, still that printed matter fairly read and taken as a whole is nothing more than a general dealer’s recommendation dependent in its turn upon the proper care for and user of the machine and due compliance with the “conditions of sale” under which the sale was made. And assuming any warranty at all, it was not by any means a naked warranty that the milker would milk the cows without injury: on the contrary, the sale of the machine was made subject to compliance with the book of printed instructions that Skinner tells us about, and with the conditions of sale which call “special attention” to certain specific points. In a word, if there was a warranty, it was not the bald warranty, without more, that the milker “would milk his cows without injury”; and to put the case to the jury as if this were the length and breadth of the warranty, was to invite them to ignore the conditions under which the sale was made, and to disregard the grossly insanitary dairy conditions that obtained upon the Skinner premises. Such a course could not fail to work injustice to the defendant company.

In the next place, we earnestly urge that the learned judge erred in defining to the jury the measure of damages, and that his instructions in that regard were

inconsistent and contradictory. At page 298, in a manner that we have already criticized, the learned judge referred to Sections 3313 and 3314 of the California Civil Code dealing with the detriment caused by a breach of warranty; and according to these two sections, that detriment includes the excess, if any, of the value which the property would have had at the time to which the warranty referred, if complied with, over its actual value at that time, plus fair compensation for the loss incurred by an effort in good faith to use the property for the particular purpose for which it was warranted to be fit. But no other elements were included within this detriment; it would not, for example, include prospective profits (*English v. Spokane Com. Co.*, 57 Fed. 451), nor would it include any other element of damages than those designated in the statute. But when we turn to page 301, we find the door thrown open to the admission of every sort or class of damage shown to have been the proximate result of injuries caused by the machine, no matter how numerous, no matter of what character. The learned judge said: "If you believe from all the evidence that plaintiff's cows were injured by the use of the milking machine furnished by the defendant while being operated in strict accordance with the instructions given to the plaintiff by the defendant, or while being operated by the defendant upon the plaintiff's cows, then the plaintiff is entitled to recover such damages as are shown by the evidence to have been the proximate result of injuries caused by said machine". Plainly, under this broad invitation, the jury could have

awarded damages for loss of profits, say, or for a variety of elements not recognized by the quoted sections of the Civil Code. Could anything have been more contradictory than this? In one breath, the jury are told in substance that the damage is limited to the designated excess of value plus the designated compensation for loss incurred in endeavoring to use the property for the particular purpose: in the next breath, the jury are told that they may allow for any sort of damage shown to have been the proximate result of injuries caused by the machine: but it was, we submit, wholly impossible for the jury to decide which of these contradictory instructions should prevail; and it is wholly impossible, we submit, for this court to say on which of them the jury acted. The rule, we think, is thoroughly settled that where instructions on a material point are contradictory the judgment will be reversed, and that even where they are contradictory in the sense only that they are confusing, the verdict cannot stand. And from this it follows that if the trial court gives to the jury two instructions, one correctly stating the law, but the other incorrectly stating it, the judgment will be reversed. The philosophy of this rule is manifested in the following, among other, cases:

Armour & Company v. Russell, 144 Fed. 614;

McCreery v. Everding, 44 Cal. 251;

Chidester v. Ditch Company, 53 id. 58;

Bank v. Bliven, 53 id. 708;

Black v. Sprague, 54 id. 266;

Aguirre v. Alexander, 58 id. 21;

Sappenfield v. R. R., 91 id. 59.

But this is not all: we are unable to conceive how, under the instructions of the learned judge, the jury could have arrived at the result formulated in the verdict. Under the law of California, every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages (C. C. 3281): this detriment is a loss or harm suffered in person or property (*id.* 3282): but this detriment must, in cases involving the breach of an obligation arising from contract, be proximately, not remotely, caused by the breach, or be such as, in the ordinary course of things, would be likely, not doubtfully, to result therefrom (*id.* 3300). It is moreover a settled rule that one person's money is not to be guessed into the pocket of another under the guise of damages: damages must be certain: "no damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin" (C. C. 3301). Plainly, then, there is no right to damages where no detriment or loss has been clearly shown with certainty: the loss must be, not only the natural, but also the proximate, consequence of the wrong (*Smith v. Bolles*, 132 U. S. 135); and therefore vague, indefinite, remote consequential or uncertain results are not embraced in the compensation given by damages,—and this for the reason, if for no other, that it cannot certainly be known, it cannot be "clearly ascertainable" (C. C. 3301) that they are attributable to the wrong, or whether they are not rather connected with other causes. It may, indeed, be added that,

under the California statute, Mr. Skinner would not, in a proper case, be entitled to recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides (C. C. 3358): but there is no proof here that a full performance of this contract upon both sides would, under the disclosures of this record as to Mr. Skinner's dairy and its environment, have obviated disease among his cattle, or have diminished his receipts; and any mere opinions of Mr. Skinner or any one else concerning these matters would be too uncertain and conjectural to form a basis for the estimation of damages,—the generalities of friendly witnesses (like the Imperial Valley fellow-residents) being too unsafe to be made the basis of a judicial award (*The Conqueror*, 166 U. S. 134).

Bearing these principles in mind, let us look for a moment at the five rules given the jury to govern them in allowing damages (301-2). How, we venture to ask, can these five rules be of any avail when we find an element common to each of them which is essentially vague, indefinite, uncertain, and not “clearly ascertainable”? And how, then, can any result reached by the application of these rules be treated as immune from the vice which infects the rules themselves? In each of these rules, the loss of butter fat is an essential ingredient: but in this case is there any factor more vague, indefinite, uncertain and not “clearly ascertainable” than this of the loss of butter fat? Mr. Skinner professes no certainty as to any loss of butter fat: the best that he attempts in that direction is a guess: at

page 292, he admits he has no record of butter fat for 1914: at pages 136 and 291-2, he admits that "no record" was kept of the amount of milk each cow gave"; and at page 138, he admits that the butter fat record for 1914, as set out in the bill of particulars (292-3), is not correct for all the months, but omits to say for what months, if for any, it is correct: upon what basis, then, was this jury to arrive at the loss of butter fat? No other witness throws any light upon this element: where were the jury to procure any certainty as to it? If we had been dealing with the Shore Acres Dairy, this element of damages could have been certainly shown, and would have been "clearly ascertainable" if that dairy had been the plaintiff: its superintendent, as a progressive man, found no difficulty in keeping a record of each particular cow, what they were producing "regularly" (215): he could have told from his figures what any cow was doing at any day: no valid reason anywhere appears to explain why Mr. Skinner could not have done this also, and thus have rendered his alleged damage "clearly ascertainable"; and if his claim be true that the injuries to his cows were attributable to the mechanical milker rather than to the unprogressive and unsanitary condition upon his dairy, he had a sufficient motive, all through the year 1914, to have kept some sort of a certain record that a court or jury might safely rely upon.

And observe the consequences of this: At pages 124-5, Mr. Skinner puts his loss in cattle at \$2025; and if we pass this item and add to it the cost of the milker (\$461.42: p. 140), we obtain \$2486.42: how, then,

did the jury reach the figure of \$3763.92 (96)—an excess of nearly thirteen hundred dollars? Not by including loss of butter fat, because that was too uncertain and was not “clearly ascertainable”. Not by including the gasoline engine, staunchions and cement floor, because the court told them to eliminate these items (299-300). Not by including the reasonable value to the plaintiff of the milking machine, because the court told them to excise that (299-300). Not by including the expense of pasturage, because we understand the court to have disallowed that (302 *ad finem*); and even if it were allowed, the foregoing figures would be increased by \$420 only, which would make the total \$2906.42, thus leaving an excess of \$857.50 unaccounted for upon any rational basis. How, then, except by guess-work, did the jury reach the figure that they did? And if their attention had been directed to the necessity for some tangible and certain basis for figuring damage, would they have adopted these inexplicable figures?

Moreover. Not only did the learned judge err in the charge as actually given, but he erred also in refusing to give certain instructions requested by the defendant company. In this regard, attention may be called to the defendant company’s proposed instructions numbered VII, IX, XIV and XV, which instructions, we submit, should have been given to the jury, and for which, no proper substitutes in our opinion can be found in the charge of the judge as given. These instructions were framed by the defendant company in accord with its theory of the case, as it had an undoubted right to do;

and we think it obvious from an inspection of the learned judge's charge that no real equivalent for the directions contained in these proposed instructions was presented for the consideration of the jury. Indeed, we cannot help but feel that taking the charge as a whole, it indicated a significant leaning in the direction of the plaintiff's side of this controversy: accent seems to us to have been put upon the plaintiff's right to recover damages: his injury and damage are generally maximized, while the views of the defendant company are generally minimized; and to such an extent was this developed that from the beginning to the end of the charge no reference was made to the conditions of sale under which the milker was sold, prominent among which was the taking of such sanitary precautions as would insure the production of clean milk. We think, in a word, that the charge taken as a whole was unduly favorable to the plaintiff and unduly unfavorable to the defendant company. We think that the contentions presented by both sides of a controversy should be accorded balanced treatment: that the charge to a jury should not select one side of a case for prominence, while at the same time depreciating the other side by silence or underestimation; and we submit that a failure to accord equal prominence to both sides of a controversy,—whether that failure be concreted in the singling out of one witness, or one class of witnesses, or one side of a case, for special prominence, thus distorting or undervaluing the other side of the controversy,—has not infrequently been the subject of judicial condemnation by respectable courts (*Thomas v. Gates*, 106 Cal. 1; *People v. Arlington*, 131 id. 231; *People v. Lonnen*,

139 id. 637; *Morgan v. State*, 48 Ohio St. 371; *Shank v. State*, 25 Ind. 207; *State v. McNeil*, 193 N. C. 552; *People v. Lyons*, 49 Mich. 78); and Judge Seymour D. Thompson, in his monograph on "Charging the Jury", after referring to the practice of summing up the evidence to the jury, as that practice has been in vogue in England, in the Federal courts, and in the courts of some of the States, goes on to say:

"It is, therefore, a golden rule, that the judge, who undertakes to present the evidence to the jury, must array before them all the material evidence on either side. He must not single out isolated parts of the testimony, and instruct the jury as to the law arising on the facts which such testimony tends to prove, and he must be careful not to give undue prominence to certain portions of it: especially he ought not to review only those facts which have a tendency to establish one side of the case. 'To sum up means, *ex vi termini*, to present all the proof to the consideration of the jury; and unless this is done, it had better be omitted altogether'. It is obviously wrong for him to single out an isolated fact, and express himself strongly upon it. It is well calculated to distort its importance in the estimation of the jury, and to concentrate their attention too intensely upon it, to the undervaluing of the rest of the evidence."

Thompson, Charging the Jury, sec. 80, page 111.

With very great respect for the learned judge who tried this case below, we submit that such a procedure as that condemned by Judge Thompson fills the mind of the jury, ever eager to "catch at intimations of the court" (*People v. Williams*, 17 Cal. 147), with disparagement, distrust and discredit of that side of the controversy which has been "damned with faint praise"; and hence it comes about that one side of the controversy is thus subjected to an unjust discount from

which the other side is quite free. We, therefore, submit that a charge to a jury which fails to give equivalent prominence to both sides of the controversy violates the principle that the law contemplates, and a fair trial requires, that the jury shall enter upon the consideration of the controversy with unbiased and inquiring, but not with biased or prejudiced, minds.

Upon the whole case, it is very earnestly submitted that in the interests of justice to this plaintiff in error, this improvident judgment should be reversed, and the cause remanded for a new trial which will be free from the errors which assisted so conspicuously in producing the verdict complained of.

Dated, San Francisco,

January 2, 1918.

Respectfully submitted,

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